The New Geographies of Corporate Law Production

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Abstract

This article starts from the understanding of corporate governance as a transnational regulatory field of law production, contestation and policy conflict. It advances three arguments, a historical one, a sociological one and a legal doctrinal/legal theoretical one. Historically, we argue that the evolution of corporate governance norms must be seen against the background of ongoing and continuing transformations in the relationships between states and markets in the provision of a growing range of formerly "public" services and functions. As the societal role of corporations expands beyond an essentially financial role, corporate governance norm production mirrors the diversification of regulatory concerns associated with the firm's place in society. From a sociological perspective, we argue that the transnationalization of present-day corporate governance regimes constitutes not so much a categorically different state of corporate law in an age of "globalization", but a continuation of the corporate law's inherent legal pluralism in terms of co-existing public and private, hard and soft, formal and informal norms. Finally, our legal doctrinal and legal theoretical argument posits that the emerging constellations of corporate governance are mirrored in changing understandings of rules applied to corporate responsibility, director liability or a company's reporting standards.

In order to further explicate the particular dynamics that characterize the new geographies of corporate governance norms today, we take the evolving law of shareholder stewardship as a case-in-point. Our analysis intervenes at the intersection of what is, normatively, a political challenge to the corporate governance understanding of the past twenty years – the latter being confined to a triple fallacy of a vain competition between shareholder versus stakeholder oriented concepts of the firm, a polarization between monolithic national models of corporate governance, and a binary distinction between state-made/hard/binding law and non-state/soft/non-binding law – and, institutionally, the dramatic de-nationalization of market regulation through governmental fiat. We argue that this plurality of corporate governance political economies today can only be scrutinized through a more differentiated, analytical

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lens which focuses on the emerging actors, norms and processes that constitute the intersecting and overlapping transnational regimes of corporate governance today. Transnational corporate governance is thereby rendered as a methodological laboratory to inquire into emerging forms of authority and legitimacy, scrutinizing competing claims of effectiveness and testing the "real world" impact that emerging regulatory forms, such as stewardship codes, have on a wider set of stakeholders and "affected" populations. In that vein, a critical project of transnational corporate governance prompts a reconceptualization of the "transnationally embedded" corporation and its key actors as a counter model to today's financialized economic governance framework and has broader implications for corporate law production.

I. INTRODUCTION

Corporate Governance is today a transnational field of regulatory norm-production, policy making and political contestation. It is constituted by the interplay between both public and private actors, which include states, a wide range of global investment funds, multinational corporations, unions, corporate and public policy think tanks as well as diverse civil society interest groups. Despite long-standing attestations to the contrary[1], its key normative foundations are continuously and, recently, with increasing intensity, scrutinized and challenged.[2] Today, the transnational spaces in which the contestation of the publicly held corporation, its role in society, its function and its purpose unfolds mirror the border—crossing organizational scope of corporations as governance institutions, law makers and wielders of enormous power and influence.[3] What emerges from an institutional and

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[1] *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668 (Mich. 1919), 507 ("There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders..."). Milton Friedman, *The social responsibility of business is to increase its profits*, NEW YORK TIMES MAGAZINE, 13 September 1970.

[2] Leo E. Strine Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L. J. 1870 (2017), 1873 ("The republic upon which typical Americans depend is one where the debate is between corporate-manager agents and money-manager agents, both of whom have different interests than ordinary human investors").

[3] Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L. L. J. 229 (2015), 231 ("… corporations have developed the capacity to negotiate with states to create norms of international law—norms that bear a particular kind of relationship of priority to the state party's domestic legal order"). Christopher May, *Who's in charge? Corporations as institutions of global governance*, 1 PALGRAVE COMM. 1 (2015), 5 ("… corporations construct regimes of private law to govern the relations between the various elements,

procedural perspective is a continuously evolving assemblage of norms, which due to their hybrid nature between obligation and recommendation, public order and private standard, sits uncomfortably with traditional notions of law as statute, court order or treaty. Today's corporate governance norms display a significantly broad regulatory focus, ranging from matters such as board composition in terms of gender or race and risk oversight to executive pay, shareholder activism and non-financial reporting. While this expansion of corporate governance is, at least in part, also a response to changing societal attitudes towards today's corporate business enterprise and its enormous socio-economic power over its various stakeholders[4], the legal nature of "social", "green" or "sustainable" corporate norm-making initiatives is problematic and remains under-explored. Seen through a public lawyer's eyes, almost everything about the transnationalization of corporate governance appears to raise questions of legitimacy.[5] In other words, who, if not a democratically elected law-maker, should create norms that potentially affect significant parts of society? Which processes are in place today to ensure adequate societal input into the design of the norms, their enforceability and their amenability to reform or adaptation? What is the norm-creating authority of the largely private actors in this field based on?

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while also seeking to influence public law institutions... The use of private law (contract provisions and arbitration agreements) often utilises public international law as a background justification but equally is crafted to serve the needs of the particular corporate network in which it is deployed…"). David L. Levy & Rami Kaplan, *Corporate Social Responsibility and Theories of Global Governance: Strategic Contestation in Global Issue Arenas*, in: OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY 432 (A.Crane, D.Matten, A.Williams, J.Moon & D.S.Siegel eds., 2008).

[4] Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77 (2017), 78 ("Of all the social and economic challenges to the current state of Delaware corporate law, perhaps the most potentially cataclysmic is the shift in attitudes about the very purpose of corporations"). See also Martin Lipton, *Corporate Governance: The New Paradigm*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, 11 January 2011 ("The effects of short-termism are damaging to the economy as a whole. (…) To provide greater macroeconomic and financial stability and to raise productivity, it is essential that markets work in the public interest and for the long term rather than only on short-term returns").

[5] Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739 (2007), 1745 ("… as economic activity increasingly crossed borders … public law, as either substantive rules or as systems of governance, has proven increasingly unable to respond efficiently to the problems of the governance of economic relations"). And *id.*, at 1747 ("The ability to disperse ownership and operations across the globe has made it possible for the largest multinational corporations to become essentially self-regulating … the absence of regulation might itself be inefficient, at least to the extent that it enhances unpredictability and arbitrary conduct...").

The following analysis intervenes in this debate on three accounts. Our first argument is a historical one, our second a sociological one and our third argument is one both of legal doctrine and legal theory. *Historically*, we show how the development of corporate governance norms, first domestically and, then, increasingly transnationally, has been keeping pace with and must be seen in close connection with particular transformations in the distribution between public and private actors in carrying out essential social functions (Part II). While these traditionally included the provision of investment opportunities for private placements and different forms of collaboration between corporations and the state on offering old-age security arrangements, corporations today have assumed central and controlling roles in the delivery of nearly all tele-communication services, vast portions of health care, municipal waste disposal and urban development and planning, infrastructure financing and even military warfare through extensive sub-contracting arrangements. As the range of corporate activities continued and continues to expand, so does the scope of what is considered to be part of the regulatory – corporate governance – framework that companies should comply with. We set out to chart these *emerging political economies* of contemporary corporate law and corporate governance against the background of three central (yet increasingly less convincing) themes in the continuing scholarly corporate governance debate over the past four decades. Historically, we recognize a triple fallacy in that regard: first, we take issue with what has turned out to be a rather vain and ultimately inconclusive (and, thus, unhelpful) *competition* between shareholder- versus stakeholder-oriented concepts of the firm. Secondly, we challenge the *polarization* that has been the central theme to distinguish and off-set against each other allegedly monolithic national models of corporate governance. Such polarization, we feel, is too often predicated on assumptions of economic efficiency which, in turn, results in an overdrawn opposition of two competing models of capitalist organization as in the convergence/divergence debate of the 1990s and early 2000s. Finally, we argue that the complex political economies which make up today's corporate governance assemblages cast the still prevailing idea of distinguishing between state-made/hard/binding law and non-state/soft/non-binding law in a critical light. In short, neither the qualifiers "public" and "private" nor of "hard" and "soft" are particularly helpful in mapping what are in reality processes of norm formation and dissemination which easily surpass state-centered law-making institutions.

Sociologically, our argument draws attention to the always already existing *instability* and *unsettledness* of regulatory norms in areas such

as corporate law, securities regulation, labor law or social protection. Legal sociologists have long been emphasizing the prevailing legal pluralist nature of regulatory governance in fields, where public and private, formal and informal, "hard" and "soft" norms not only exist side by side, but in fact complement one another by addressing different aspects of social or institutional behavior. Today's diversified and, as regards its border-crossing nature, *transnational* constitution of corporate governance norm-production is not an anomaly of law-making, but a further step in the evolution of legal norms in politically sensitive and continuously changing contexts. By reviewing the development of corporate governance regimes as a particular form of regulatory governance "in context", we argue in Part III that the transnational constellations of actors, norms and processes which constitute today's corporate governance regulation produce new and overlapping political economies. No longer confined to the regulatory prerogative of a domestic law maker or regulator but also not (yet) having been reclaimed by an international financial regulator with global governance authority, corporate governance rules today appear, instead, as being negotiated, shaped, disseminated as well as "hardened" through the interplay of major market players and supranational institutions, in relation to whom states have increasingly assumed the role of mediators or mere facilitators. Building on the important political economy work on the "varieties of capitalism" (VoC) and the tensions between so-called "coordinated" and "liberal" market economies, we argue that today's proliferation of public, private and hybrid processes of corporate governance norm production requires a differentiated view on the relationship between states and local, regional and global markets. And, it is, ultimately, from a pluralized political economy perspective on corporate law that we propose a reconceptualization of corporate law and, in particular, of corporate governance *as* a transnational field, which can no longer adequately be depicted through the categories which used to apply for corporate law as a domestic law and policy concern.

We argue for a maturation of corporate governance regulation in a pluralistic world which is not entirely centered in national political and legal orders but emerging out of and reaching beyond them. But at the same time national corporate governance regulation is being transformed from within by global agendas and goals.[6] From this perspective, the proposal of an idea of *transnational corporate governance* aims at opening a research agenda for corporate governance scholarship which is based on

[6] For an incisive analysis of contemporary global social change, see SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2008).

the contextual approach outlined above and which critically challenges a pre-dominantly law-and-economics analysis of corporate governance,[7] which posits the inevitable convergence of national laws through a process of regulatory competition – while not always exploring more deeply the particular political challenges that arise from distinctly *transnational*, *hybrid* formation processes of corporate governance in globalized financial markets, which are driven by the interplay of governments, institutional investors, but also unions, labor and community as well as environmental activists.

In contrast to important work, which connects corporate law theory with a focus on the respective political economy context,[8] a transnational legal pluralist approach to corporate governance posits to both build on and go beyond the institutional analysis provided by the VoC scholars. In that vein, it becomes possible to study the emergence of private and self-regulatory regimes in corporate governance against the background of the state transformation that marks the fate of modern nation states in the global era.[9] Such an approach can be off-set from the still dominant one, according to which the "end of history"[10] sees a global convergence of shareholder value-oriented norms for corporate governance, while differences in regulatory approaches will be traded and settled on a "global market for corporate law".[11] A transnational legal pluralist approach to corporate governance engages but is not limited *to* the domestic space as an important forum for corporate governance creation. It resists drawing categorical lines between the national, the supranational and the international spheres of norm creation and instead acknowledges the specific processes of norm creation which occur among and through public and private actors within as well as across those boundaries.[12] As such, it resists the normative consequentiality of the

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[7] *See infra* Part II.

[8] Mark Roe and his collaborators have undertaken important steps in that direction. See e.g. Mark J. Roe & Massimimiliano Vatiero, *Corporate Governance and Its Political Economy*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 56-83 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018). See already MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE, POLITICAL CONTEXT, CORPORATE IMPACT (2003).

[9] Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQU., 229-264 (2012).

[10] Henry Hansmann and Reinier Kraakman, *The End of History for Corporate Law,* 89 GEO. L. J. 439 (2001).

[11] ERIN O'HARA & LIBSTEIN E. RIBSTEIN, THE LAW MARKET (2009).

[12] See in that regard also Julia Black & David Rouch, *The development of global markets as rule-makers: engagement and legitimacy*, L. & FIN. MARKETS REV., 218-233 (2008).

dominant narrative, which emphasizes the restrained role that governments should play in "regulating" corporate behavior *per se* while embracing the idea that restraint will eventually result in a perfect regulatory regime for corporations on a global scale. The blind-spot of this narrative remains the, actually, much wider political debate about the role that corporations play in modern societies, a debate which touches on the immense impact of corporations on employment, social security, the environment and, increasingly, privacy[13], and which oftentimes seems to be going on in considerable distance from the specialized corporate law circles as such.[14] But, not only financialization has transformed the corporation and corporate law.[15] At a time, where consumption patterns have become insulated from climactical or geographical facilities and where the global exchange, extraction and sale of data fuels a 365/yr & 24/7 available, "informed" and willing consumer, corporations hold significant power. Meanwhile, the regulatory theories which focus on corporations and their internal and external relations, are lagging behind.

From this follows our third argument, which concerns the interplay between legal doctrine and legal theory in corporate governance today. In light of a legal pluralist understanding of corporate governance norm production today, the related institutions of norm production, adjudication and enforcement are taking on new forms. Legal institutions, like law itself, do not exist in the abstract and ephemeral, but in concrete social contexts. It is from them that they receive affirmation or rejection, impulses for change or continuity. Legal doctrine, in corporate law and beyond, is a child of time, and as such must be understood in the context in which it is relied upon. As we show in our analysis in Part III, this context for (corporate) law production has been undergoing significant changes with privatization and globalization

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[13] For an excellent and comprehensive analysis of the challenges posed by the digital technology and the quest by powerful corporations to predict and control behavioral patterns, see SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2018).

[14] David Vogel, *Political Science and the Study of Corporate Power: A Dissent from the New Conventional Wisdom*, 17 BRIT. J. POL. SCI., 385 (1987); Barbara Fryzel, *Governance of Corporate Power Networks*, 23 FINANCE & BIEN COMMUN 28-38 (2005); Geert de Neve, *Power, Inequality, and Corporate Social Responsibility*, 54 REV. LAB. , 63-71 (2009); GEORGE MONBIOT, *Taming corporate power: the key political issue or our age,* THE GUARDIAN, 8 December 2014; Nicholas Connolly, *Corporate power and human rights*, 19 INT'L J. HUM. RTS. 663 (2015).

[15] Laura Horn, *The financialization of the corporation*, in THE CORPORATION. A CRITICAL, MULTI-DISCIPLINARY HANDBOOK 281 (G. Baars ed., 2017); Costas Lapavitsas, *The financialization of capitalism: Profiting without producing*, 17 CITY, 792 (2013).

driving a fundamental reconfiguration of traditional architectures of public law making and administration. As corporate governance codes, codes of conduct and other best practice standards become more and more woven into the regulatory/self-regulatory fabric of what constitutes corporate law around the world today, legal doctrine is fast-learning to navigate these new formations. As codes formulate new modes of accountability, transparency and compliance, doctrinal assessments of corporate and directors' liability or a company's and its investors' reporting obligations change.[16] These adaptations are neither born out of essentialist assertions of legal causality and responsibility nor do they neatly adhere to law-and-economics principles underlying the "nature of the firm": instead, the new legal doctrines of corporate governance incorporate these continuously evolving standards but evaluate, assess and shape them in light of the changing sociological constellations that constitute the regulatory universe of corporate governance today.

In order to further explicate the particular dynamics that characterize the transnational emergence of corporate governance norms today, we take in Part IV the evolving law of shareholder stewardship as a case-in-point. We trace the shareholder stewardship movement from its beginnings with the internalized self-regulatory processes which translated into the "soft" UK Stewardship Code and other similar codes across various countries forward to the time of the amended EU Shareholder Rights Directive (SRD II).[17] We posit that shareholder stewardship, even though it started as a case of enrolling institutional shareholders in corporate governance regulation via soft, market-invoking law based on conventional law-and-economics assumptions, it became increasingly hardened and brought a "public" coloration into shareholder engagement and investment management integrating sustainability concerns. At the same time, the adoption of stewardship

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[16] Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 COLO. L. REV. 731 (2019), 734 ("Financial analysts increasingly consider environmental, social, and governance (ESG) factors in rating companies ... The complication for a fiduciary is that these factors may also reflect benefits or costs beyond a company's financial bottom line"). See already Frederick Alexander, *Delaware Public Benefit Corporations: Widening the Fiduciary Aperture to Broaden the Corporate Mission*, 28 J. APPL. CORP. FIN. 66 (2016). *Id.*, *The Capital Markets and Benefit Corporations*, AMERICAN BAR ASSOCIATION, BUSINESS LAW TODAY, 29 July 2016, *available at*: https://www.americanbar.org/groups/business_law/publications/blt/2016/07/05_alexander/.

[17] Directive 2017/828/EU of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1 [hereinafter SRD II].

codes across 19 countries, the SRD II and the development of supporting stewardship principles and codes of conduct by regional and international investor associations show that the national, regional and international "policy space" is currently much more perplexed. Part V concludes by reconsidering transnational corporate governance as regulatory governance.

II. THE TRANSNATIONALIZATION OF CORPORATE GOVERNANCE: A HISTORICAL PERSPECTIVE

1. Unfolding the Emerging Regulatory Geography of Corporate Governance

How does today's corporate governance landscape and its distinctly transnational constitution compare to the prevailing understanding of corporate law as a predominantly domestic, only rarely international or global concern? While this is hardly the place for a detailed account to the origins of the modern corporation and contemporary corporate governance,[18] there are two stories to follow here, and the distinction between them will inform our ensuing analysis.

Within the discipline, the legal field of corporate law, the theme of corporate governance emerged as a field of study in the mid-1970s and it was throughout the 20th century that corporate governance scholarship and debate have stayed relatively close to the general understanding of the corporation as, above all, an investment vehicle: as a result, discussions among corporate law scholars and practitioners mainly focused on a handful of key themes and issues, including the operation, duties and composition of the board of directors,[19] as well as on the tension

[18] For a historical account of the modern corporation, see, e.g., Ron Harris *Law, Finance and the First Corporations* in GLOBAL PERSPECTIVES ON THE RULE OF LAW, 145-171 (Lee Cabatingham, James J. Heckman & Robert L. Nelson eds., 2010); Oscar Gelderblom, Abe de Jong and Joost Jonker *The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602-1623* 73 J. OF ECON. HISTORY 1050-1076 (2013); Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West *The Evolution of Corporate Law* 23 UNI. OF PENN. J. INT'L ECON. L. 791 (2002).

[19] George W. Dent Jr., *The Revolution in Corporate Governance, the Monitoring Board, and the Directors' Duty of Care*, 61 BOSTON UNIV. L. REV. 623 (1981); Franklin A. Gevurtz, *The Historical and Political Origins of the Corporate Board of Directors*, 33 HOFSTRA L. REV. 89 (2004).

between managerial authority and shareholder rights[20], on executive remuneration and, to some degree, on the differences among national systems of corporate governance.[21] The focus here was predominantly on thefunctional role of corporate law..[22] Correspondingly, seeing law's role with regard to the corporation as "enabling"[23], rather than as mandatory, corporate governance norms were measured primarily with regard to their ability to facilitate the attraction of capital.[24] Mirroring the rise in importance of the idea of shareholder wealth maximization as a firm's definitive performance measure, corporate governance rules have been at the center of a continuing debate over how to best organize and run a company.

Meanwhile, there has been, for a long time, a parallel corporate governance discourse, which is concerned with the socio-economic context of the actual firm. This discourse is grounded in a political economy analysis of the historically evolving institutional and normative frameworks that constitute the firm's regulatory environment which is seen to go beyond the 'separation of ownership and control' focus of corporate law. A political economy analysis of corporate governance sees corporate law rules in relation to the law governing industrial relations,

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[20] Stephen Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 THE TRANSN'L LAWYER 45 (2002); Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STANFORD L. REV. 1255 (2007-2008).

[21] *See* the discussion in what has by now become a classic: REINIER KRAAKMAN et al., THE ANATOMY OF CORPORATE LAW. A COMPARATIVE AND FUNCTIONAL APPROACH (3rd ed., 2017). See already FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). For the differences between the US and the UK, specifically, see CHRISTOPHER BRUNER CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013). Also, for a recent change of the corporate governance debate in the US, see The Business Roundtable, Statement on the Purpose of a Corporation (2019), https://opportunity.businessroundtable.org/ourcommitment/. Still one of the most astute and perceptive comparative accounts is provided by John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 AM. J. COMP. L. 501-534 (1998).

[22] KRAAKMAN ET AL, *ANATOMY*, *id*.

[23] An insightful discussion is provided by John C. Coffee, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV., 1618 (1989). See also Edwin R. Latty, *Why Are Business Corporation Laws Largely Enabling*, 50 CORNELL L. REV. 599 (1965).

[24] Hansmann and Kraakman, *supra* note 21.

social protection and employment.[25] In that light, scholars of history, economics, sociology, politics and socio-legal change situate the study of corporate governance within the transformation context of public and, increasingly, private governance regimes in more and more areas of social, political and economic areas life[26] The difference in perspective between a more conceptual and this contextual approach is crucial, especially when we seek to explain the increasing significance of corporate governance regulation on a global scale.[27]

The global dimension of corporate governance as a contested and fast-evolving policy field is reflected in debates over the organization of the firm, the rules governing the relationships between shareholders and managers, the level of executive pay and of diversity on the board as well as the firm's philanthropic and environmental engagement as they are intimately intertwined with the dynamics of global investment.[28] Because a company's corporate governance set-up is received as a signal by the market for corporate investment and translates into the firm's traded value, there is a constant push and pull between a firm's efforts to attract capital and its ability to prove its compliance with the type of corporate governance that markets will reward.

These dynamics unfold across a turbulent history of scandal, crisis, pressure for reform and a wider debate regarding the place and role of the

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[25] *See*, *e.g.*, Peter A. Hall & Daniel W. Gingerich, V*arieties of Capitalism and Institutional Complementarities in the Political Economy: An Empirical Analysis,* 30 BRIT. J. POL. SCIE. 449-482 (2009), and Claire M. O'Brien, *Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law*, 9 GERMAN L. J., 1007-1042 (2008).

[26] *See, e.g.*, the contributions to J. ROGERS HOLLINGSWORTH & ROBERT BOYER EDS., CONTEMPORARY CAPITALISM. THE EMBEDDEDNESS OF INSTITUTIONS (1997). And, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004), 343-4 ("In all of these contexts, government harnesses the power of new technologies, market innovation, and civic engagement to enable different stakeholders to contribute to the project of governance").

[27] *See*, *e.g.*, ALAN DIGNAM & MICHAEL GALANIS, THE GLOBALIZATION OF CORPORATE GOVERNANCE (2009).

[28] *See* Douglas Cumming et al, *Law, finance, and the international mobility of corporate governance*, 48 J. INT'L. BUS. STUD. 123 (2017), 125 ("The financial impact of good governance on the firm is unambiguously positive, both in terms of short-term efficiency outcomes and longer-term sustain-ability of the business. Perhaps most intuitive is that good governance, which minimizes the chance of managerial tunneling (...) as the expropriation of corporate assets or profits –leads to an enhanced capability of the firm to raise external capital (...) provide important metrics for the robustness of governance at the firm level and find that good governance firms have higher firm value, profits, and sales growth").

large business firm in society.[29] The opening decade of the twenty-first century witnessed a series of large-scale corporate scandals, including Enron, Royal Ahold, Parmalat, Satyam, Tyco and Worldcom,[30] and market failures, from the bursting of the dot-com bubble in 2000-1 to the GFC in 2008/9.[31] While these events have been associated, on different scales, with poor corporate governance practices or management misconduct and have significantly eroded public trust in large corporations and business more generally, they have also been formative in the creation of the current momentum of public debate about the corporation, its purpose and its responsibilities.

In trying to better understand the direction of contemporary corporate governance norm making, whether through the proliferation of private ordering processes and the creation of codes[32], judicial intervention[33] or legislative innovation[34], these developments do not occur in a vacuum. Instead, one has to consider the changes in the general political economy after the height of the redistributive welfare state of the 1970s, on the one hand, and the transformation that corporate law/corporate governance systems have undergone since that time under

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[29] Dorff, *supra* note 4; Lipton, *supra* note 4.

[30] For summaries of the scandals, see *Looking back at the rise and fall of Enron* HOUSTON CHRONICLE, Nov. 28, 2018, *available at* https://www.chron.com/local/history/economy-business/article/The-rise-and-fall-of-Enron-9712210.php; Gregory Crouch *Ahold to Pay $1.1 Billion to Settle Fraud Suits* N.Y. TIMES, AT 10; *How Parmalat Went Sour* BLOOMBERG BUSINESSWEEK, JAN. 12 2004, *available at* https://www.bloomberg.com/news/articles/2004-01-11/how-parmalat-went-sour; Vanessa Valkin, *Tyco unwilling to certify accounts* FIN. TIMES JUL. 24 2002, AT 25; *The world after WordCom* FIN. TIMES Jun. 27, 2002; Geeta Anand, *The Satyam Scandal* WALL ST. J. ASIA, Jan. 8, 2009, At 12.

[31] *See*, e.g., John C. Coffee *What Went Wrong? An Initial Inquiry Into the Causes of the 2008 Financial Crisis* 9 J. OF CORP. LAW STUDIES, 1 (2009).

[32] Jean du Plessis and Chee Keong Low, *Corporate Governance Codes under the Spotlight* in CORPORATE GOVERNANCE CODES FOR THE 21ST CENTURY 3-20 (Jean du Plessis and Chee Keong Low eds., 2017); Klaus Gugler et al, *Corporate Governance and Globalization*, 20 OXF. REV. ECON. POL. 129, 149 (2004).

[33] *See*, *e.g.*, *Ebay v. Newmark (Craigslist)*, 16 A.3d 1 (Del. Ch. 2010); Gordon Smith, *eBay v Newmark: A Modern Version of Dodge v. Ford Motor Company*, THE CONGLOMERATE, 9 September 2010, available at: https://www.theconglomerate.org/2010/09/ebay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html. But, see also *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[34] 8 XV Del. G.C.L. §§ 361-362, *available at*: https://delcode.delaware.gov/title8/c001/sc15/; Leo E. Strine Jr., *Making it Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235 (2014). And, see the EUROPEAN UNION DIRECTIVE 2014/95/EU AS REGARDS DISCLOSURE OF NON-FINANCIAL AND DIVERSITY INFORMATION BY CERTAIN LARGE UNDERTAKINGS AND GROUPS, *available at*: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095.

the influence of globalizing capital markets. As the end of "embedded liberalism"[35] followed on the abdication of the gold standard and the powerful take-off of global financial flows, borders between differently legitimated regulatory authorities became increasingly blurred. As public and private regulators have been developing frameworks to more efficiently meet sector-specific demands in a now globally integrated marketplace for goods, services, capital, knowledge and data, these today raise difficult questions in terms of what they tell us about the relationship between "public authority" and "private power".[36]

Today, twenty years into the twenty-first century, corporate scandals, including Olympus, Wells Fargo, Mitsubishi Motors and Sports Direct, continue to expose corporate governance gaps in recent reforms and business practices,[37] for example with regard to executive compensation, directors' independency, institutional investors, disclosure or risk management. At the same time, corporate governance debates today have widened significantly and are concerned with the corporation itself and the recognition of claims for gender equality, environmental conservation and climate change mitigation.[38] Reflected also in the current and deepening crisis of MBA programs today,[39] it is this wider and more comprehensive engagement with the business corporation and

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[35] John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT"L ORG. 379-415 (1982).

[36] Black & Rouch, *supra*, note 10; For a critique of private ordering in a global context, see A. CLAIRE CUTLER, PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY (2003).

[37] *See*, *e.g*., "Olympian illogic; Europe and US should heed lessons of Japanese scandal" FIN. TIMES (Nov. 8 11), https://www.ft.com/content/a3f20100-0a26-11e1-92b5-00144feabdc0; Rachel L. Ensign "Wells Fargo Struggles to Regain Footing" WALL STR. J. (Apr. 1 2019) J B1; *See* also John C. Coffee, *A Theory of Corporate Scandals: Why the U.S. and Europe Differ* 21 OXFORD REV. ECON. POLICY 198 (2005).

[38] E.g. Barnali Choudhury & Martin Petrin, *Corporate governance that 'works for everyone': promoting public policies through corporate governance mechanisms* 18 J. CORP. L. STUD. 381 (2018). *See* also Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, 11 February 2019, *available at*: https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/, (arguing that the dominant SHV focused theories "ignore the reality that other groups of stakeholders beyond shareholders—employees, customers, suppliers, creditors, and taxpayers—have a stake in corporate productivity … Under shareholder primacy, these stakeholders have no voice inside an institution").

[39] "*The MBA disrupted. The future of management education*" THE ECONOMIST (Octob. 31 2019). *See* already Peter Beusch, *Towards sustainable capitalism in the development of higher education business school curricula and management*, 28 INT'L J. EDUC. MANAGEMENT 523 (2014).

its place in society that shapes much of the debates at the moment, whether that concerns the largely untamed "power" of corporations over labor, consumers, local communities, the environment or 'big business' growing influence on social, economic and political processes.[40] This contextualization of the corporation not just as an investment vehicle but as a powerful actor in a socio-economic context in a state of transformation[41], allows for an appreciation of the company and its laws through a sociological and historical lens. What becomes visible under that lens is a non-linear, complex trajectory of the business corporation from the time of *Lochner*[42] and *Dodge*[43] through the period of the 'affluent society'[44] and the 'new property'[45] on through the transnationalization of the corporation[46] with its trials and tribulations[47] until the present time.as a central nodal point in the acquisition and control of "information", "data", and "knowledge".[48]

The emerging, new geographies of corporate governance does not only reflect the reconfiguration of the state whose role is today less and less that of a central anchor of regulatory authority, but also by the proliferation of different forms of regulation. While the early 2000s saw a surge in the creation of corporate governance codes and best-practice

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[40] John Dunbar, *The "Citizens United" Decision and Why it Matters,* CENTER FOR PUBLIC INTEGRITY, May 1, 2018, *available at* https://publicintegrity.org/federal-politics/the-citizens-united-decision-and-why-it-matters/

[41] IAN HARDEN, THE CONTRACTING STATE (1992); Jody Freeman, *The Contracting State*, 28 FLA. ST. UNIV. L. REV. 155 (2000); Catherine E. Rudder, *Private Governance as Public Policy: A Paradigmatic Shift*, 70 J. POL. 899 (2008).

[42] *Lochner v. New York*, 45 U.S. 198 (1905).

[43] *Supra* note 1.

[44] JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY (1958).

[45] Charles A. Reich, *The New Property*, 73 YALE L. J. 733 (1964)

[46] Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

[47] John Gerard Ruggie, *Multinationals as global institution: Power, authority and relative autonomy*, 12 REG. & GOV. 317 (2018); Christina Stringer & Snejina Michailova, *Why modern slavery thrives in multinational corporations' global value chains*, 26 MULTINAT'L BUS. REV. 194 (2018); Jennifer Bair & Florence Palpacuer, *CSR beyond the corporation: contested governance in global value chains*, 15 GLOBAL NETWORKS, supplemental issue, S1-S9 (2015); Peer Zumbansen, *Politicizing the Law of Global Value Chain Capitalism*, 1 J. POLITICAL ECON., in press.

[48] Jeffrey Ritter and Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward*, 16 DUKE L. & TECHNOLOGY REV. 220 (2018); Ivan Stepanov, *Introducing a property right over data in the EU: the data producer's right – an evaluation*, 32 INTER'L REV. L., COMPUTERS AND TECHNOLOGY 1 (2018). *See* also VIKTOR MAYER-SCHÖNBERGER & THOMAS RAMGE, REINVENTING CAPITALISM IN THE AGE OF BIG DATA (2018), 179 ("The system, even if perhaps appearing to promote liberal values, would make George Orwell blush and the East German Stasi salivate: seeming freedom on the outside but total state control on the inside").

guidelines in countries all around the world, the main drivers for this development, arguably, remained the attempt on the part of different sovereign states to render their corporate governance regimes more amenable and, effectively, more attractive for capital flows and investment practices which have become increasingly volatile and impatient. In recent years, however, states have come under even greater pressure from powerful private actors that administer enormous financial funds and have begun to claim a growing stake in setting the regulatory parameters for world-wide corporate investment, often in concomitance with market-driven regulatory incentives.[49]

The new and continuously evolving processes of regulatory innovation are generating a diversifying and particular set of norms, which go far beyond the governance scope that had still characterized the first-generation corporate governance codes.[50] There is today no doubt that, despite the shareholder value maximization idea's fast rebound after the GFC, the discourse has begun to shift – in a number of directions.[51] Leaving behind a somewhat stale and never fully satisfactory track record of corporate social responsibility (CSR) initiatives, at least since the 1960s, it appears that today CSR is being transformed into a more ambitious and, as regards its scope, more comprehensive governance idea.[52] This new generation of CSR no longer pits shareholders against stakeholders as representatives of two neatly distinguishable constituent groups of the modern business corporation, but is grounded in the societal transformation that companies have been involved in the context of the privatization of formerly public functions on the level of the nation state and beyond.

What emerges before our eyes is a both *fragmented* – in terms of the specific regulatory authority of various involved actors – and, at the same

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[49] *See infra* Part IV.

[50] *See infra* Part V.

[51] *See* also *infra* Part II.2.

[52] *See*, *e.g.*, Banu Ozkazanc-Pan, *CSR as Gendered Neocoloniality in the Global South*, 160 J. BUS. ETHICS 851-864, 857 (2019) (scrutinizing how "CSR initiatives in the Global South focus on "giving" factory workers a particular set of rights that mimic those we might see in developed nations in the West, such as safe working conditions"). And, see Dirk Matten & Jeremy Moon, *The Meaning and Dynamics of Corporate Social Responsibility*, 45 ACAD. MGT. REV. 7 (2020), 9 ("First, many CSR issues are concerned with the wider responsibilities that companies take for some of their potential negative impacts in their supply chains and even their value chains (e.g., unsafe working conditions, slavery-like terms of employment, pollution, resource depletion). Second, many companies are increasingly focused on the impacts of their operations on the planet at large (e.g., policies related to climate change, species diversity, natural resource depletion …").

time, *spatialized* – in terms of the global reach of relevant regulatory regimes – assemblage of corporate governance architectures. While their focus is still on the business corporation and its core concerns as investment vehicle, corporate governance norms today take on board a diverse and pluralistic set of concerns and interests, which are in turn promoted by traditional (state) and non-traditional (private) "law-making" actors. The proliferation of the latter is grounded in different countries' particular histories of state transformation and privatization, on the one hand, while developing in tandem with a global rise of private ordering and standard setting, on the other.[53]. It is this co-existence of public and private normative institutional frameworks of contemporary corporate governance that gives rise to a transnational multiplication of hybrid, public and private, national and international corporate law production.[54] Given the extensive role that corporations play in the context of an almost infinite number of societal affairs and in consideration of the variation of specific instruments and institutional forms that corporate governance rules take on in different parts of the world, we can speak of *a plurality of political economies of corporate governance* today.

In the context of this newly emerging, transnational geography of corporate governance, the traditional corporate governance narratives, which have their foundation in a law & economics understanding of the corporation,seem to have only limited analytical value. By contrast, while the here suggested contextual approach places corporate governance in a field of contestation, that arguably extends beyond organizational matters related to executive pay or board composition, it also seems the only way to effectively address the corporation in its actual operational environment. it is in that regard that we argue for a reconceptualization of corporate law and corporate governance *as a transnational* regulatory *concern* which is part of a law & political economy analysis of how corporations are regulated as part of a larger critical engagement with the relationship between states and markets.[55] Corporate governance

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[53] NILS BRUNSSON ET AL, A WORLD OF STANDARDS (2000); *see* also TIM BÜTHE AND WALTER MATTLI THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY (2013).

[54] *See*, *e.g.*, Bastiaan van Apeldoorn, Andreas Nölke & Henk Overbeek, *The Transnational Political Economy of Corporate Governance Regulation: A Research Outline*, VRIJE UNIVERSITEIT AMSTERDAM, WORKING PAPERS POLITICAL SCIENCE NO. 5/2003, *available at*: https://research.vu.nl/ws/portalfiles/portal/74100928/137F9259-D62F-46C8-AC0A5F4C6F592E4B.

[55] *See* YVES TIBERGHIEN, ENTREPRENEURIAL STATES. REFORMING CORPORATE GOVERNANCE IN FRANCE, JAPAN, AND KOREA (2007), and the contributions to Edward J.

regulation must, in our view, be described as "transnational" because it cuts across the boundaries between the domestic and the international, the public and the private. Transnational as a category, then, is of lesser value in demarcating jurisdictional borders than it is in exposing the doctrinal and conceptual premises based on which an issue is associated with the domestic or the international arena. By, instead, focusing on the transnational landscape of different actors, norms and processes, that include but are not limited to states, laws, court decisions and parliamentary lawmaking, it becomes possible to understand the transnational law of corporate governance as a methodology of (a particular area of) law *in a global contex*t.[56]

In the following section, we set out to chart these emerging political economies of contemporary corporate governance against the historical background of corporate governance regulation and state transformation over the past four decades.

2. "Scholarly Bind One": The Vain Competition between Shareholder Versus Stakeholder Conceptions of the Corporation

The emergence of corporate governance as a topic of interest among scholars, policymakers and practitioners of corporate law and the political economy of the firm coincided with the fading of the "business stateman"[57] and the rising prevalence of what has variously been termed as the "contractarian", "nexus of contracts", or "private ordering" theory of the firm.[58] During a period when economic theories prevailed, corporate governance was mainly studied through the neoclassical economic lens of agency theory.[59] For the proponents of agency theory, corporate governance mainly deals with the balance of power between "the three

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Balleisen & David A. Moss eds., GOVERNMENT AND MARKETS. TOWARD A NEW THEORY OF REGULATION (2010).

[56] Peer Zumbansen, *Transnational Law, Evolving,* in EDWARD ELGAR, ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW, 898-935 (Jan Smits ed. 2d ed. 2012); Peer Zumbansen, *Transnational Law, With and Beyond Jessup,* in THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL (Peer Zumbansen ed., 2020), *in press*.

[57] A magisterial presentation can be found in ADOLF A. BERLE, THE TWENTIETH-CENTURY CAPITALIST REVOLUTION (1954).

[58] Alchian A. Alchian & Harold Demsetz (1972), *Production, Information Costs and Economic Organization,* 62 AM. ECON. REV. 777; Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure,* 3 J. FIN. ECON. 305 (1976).

[59] Eugene F. Fama & Michael C. Jensen, *Separation of ownership and control*, 26 J. L. & ECON. 1155 (1983).

key players – the executives, the board of directors and the shareholders",[60] while the aim of analysis is to reduce the organizational costs of running business through corporations,[61] and to maximize shareholder value on the basis of shareholders' residual claims on the corporation.[62] Agency theory, along with other economic theories of the firm,[63] had far-reaching effects on the study of the internal organization and power structure of the corporation, the functioning and interrelationships among the allegedly key corporate actors (board of directors, shareholders and management) and their relationships with other stakeholders, particularly labor and creditors.[64]

Looking at the US as an exemplary case, much of the American corporate law scholarship in the last 50 years aimed at finding a mechanism to minimize the agency costs that arise from the separation of ownership and control and bolstered better corporate governance through hostile takeovers, independent directors, performance-based remuneration, and activist shareholders.[65] At the same time, from a teleological perspective, three alternative analytic models, that is shareholder primacy,[66] director primacy,[67] and team production[68] prevailed (and still do, to a large extent) in US scholarship, offering

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[60] ROBERT A.G. MONKS & NELL MINNOW CORPORATE GOVERNANCE 2001, Preface, xvii. For a recent account of corporate governance, *see* Marianna Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016).

[61] *E.g.* Oliver Williamson , *Corporate Governance*, 93 YALE L. J. 1197 (1984).

[62] Fama & Jensen, *supra* note 59, 302.

[63] Transaction cost economics also supported shareholder governance perceiving shareholders as the only corporate constituents that cannot protect themselves from firm-specific risk. *See* prominently OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1985). *See* also Benjamin M. Oviatt, *Agency and Transaction Cost Perspectives on the Manager-Shareholder Relationship: Incentives for Congruent Interests*, 13 ACAD. MANAGEMENT REV., 214-225 (1998).

[64] JOHN ROBERTS, THE MODERN FIRM. ORGANIZATIONAL DESIGN FOR PERFORMANCE AND GROWTH (2004), 123ff.

[65] *See*, *e.g.*, Henry Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON., 110 (1965); Ronald J. Gilson and Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863; LUCIEN A. BEBCHUK AND JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (1991).

[66] Lucien A. Bebchuk, *The Myth of Shareholder Franchise*, 93 VAND. L. REV. (2007) 675.

[67] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. L. REV., 547 (2003); Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601 (2006).

[68] Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV., 247 (1999). *See*, however, Martin Gelter, *The Dark Side of Shareholder Influence*, 50 HARV. INT'L L. J. 129 (2009).

differing views on what should be seen as the proper purpose of the corporation. Both shareholder primacy and director primacy models – derived from neoclassical views of the firm – privilege shareholders relative to other corporate constituents and are consistent with shareholder wealth maximization,[69] even though they take contrary positions to the retention of the status quo of managerial control in US companies and the merits of shareholder governance.[70] By contrast, the team production theory of Blair and Stout[71] insulates directors from shareholders' direct control exposing shareholder primacy as a "myth".[72] Even though the team production theory seems to align with stakeholder theories of corporate governance,[73] Blair and Stout focus only on the firm-specific contributions of numerous constituencies. A "mediating" board, meanwhile does not necessarily protect stakeholders,[74] as it "remain[s] subject to equity market pressures".[75] Critics of shareholder value maximization in the US advanced the argument that the firm-specific contributions of *all* corporate constituents should be considered. In the same vein, they championed the board's superior decision-making freedom to weigh the various interests in the balance defending (perhaps paradoxically for the non-US audience) the status quo of managerial control.[76]

Economic literature associated the stakeholder perspective with the property rights analysis of the firm in asserting that not only shareholders, but also other corporate constituents, such as employees,

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[69] STEPHEN M BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE, 65-72 (2008).

[70] *See, e.g.*, Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder-Stakeholder Debates in a Comparative Light*, 7 NYU J. L. & BUS. 641 (2011).

[71] Blair & Stout, *supra* note 68. This theory is built on the Rajan and Zingales' theory of firm which is based on the property rights approach. *See*, further, Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 QUART'Y J. ECON. 387 (1998).

[72] Lynn Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV., 1188 (2002).

[73] Blair and Stout, *supra* note 68, at 281 (arguing that directors are "trustees for the corporation itself").

[74] David Millon, *New Game Plan or Business as Usual? A Critique of the Team Production Model of Corporate Law*, 86 VA. L. REV., 1001 (2000); George W. Dent, *Academics in Wonderland: The Team Production and Director Primacy Models of Corporate Governance*, 44 HOUS. L. REV. 1213, 1129-33 (2008).

[75] Margaret M. Blair & Lynn A. Stout, *Director Accountability and the Mediating Role of the Corporate Board*, WASH. L. QUART'Y 403, 435 (2001).

[76] *See*, further, Gelter, *supra note* 70.

can be residual claimants in investing in specific human capital.[77] Alternative arguments in support of stakeholder's mandate in the firm have often been associated with the CSR movement,[78] while being mainly derived from the stakeholder theory of the corporation. Even though the classic stakeholder theory statement can be traced to Dodd's writings in the early 20th century,[79] stakeholder theories made their way into academic circles (mainly in management literature) after the 1980s,[80] relying on a range of theoretical bases and evidently displaying varying definitions of normative and policy purpose.[81] Under the stakeholder perspective corporations engage with nothing less than a variety of different stakeholders including insiders such as shareholders, managers, and employees and outsiders such as creditors, suppliers and customers. "Progressive" US corporate scholars have advanced a multi-stakeholder concept of the corporation under which corporate managers and directors can be understood to owe consideration (and perhaps even fiduciary duties) to a wider range of corporate constituents than shareholders, including obligations to employees, consumers, suppliers, communities, and the environment.[82] Yet, such a broad stakeholder approach has mostly remained on the sidelines and stakeholders mainly refer to non-shareholder constituencies who bear risk as a result of the firm's activities. At the same time, the predominant academic assumption in the US – except for the middle decades of the century (1940s-1970s) where managerialism in North America and Europe coincided with public, societal interests – remains that corporations as private, economic entities should be run for the collective benefit of shareholders.

Corporate governance in the UK, like the US, has been largely occupied by the assumptions of neoclassical economics and the agency

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[77] *See*, *e.g.*, Oliver Hart, *An Economist's Perspective on the theory of the firm*, 89 COLUM. L. REV. 1757, 1765 (1989); Oliver Hart and John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON., 1119 (1990).

[78] The CSR literature is voluminous, but *see*, *e.g.*, Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U C. DAVIS L. REV. 705 (2002).

[79] E. Merrick Dodd Jr., For Whom Are Corporate Managers Trustees, 45 HARV. L. REV. 1145 (1932).

[80] The literature is voluminous, but a landmark publication is R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH (1984).

[81] Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications*, 20 ACAD. MGT. REV. 65 (1995); a masterful paper remains David Millon, *Theories of the Corporation*, DUKE L. J., 201-262 (1990).

[82] *See* generally LAWRENCE E. MITCHELL (ED), PROGRESSIVE CORPORATE LAW: NEW PERSPECTIVES ON LAW, CULTURE & SOCIETY (1995); KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES (2010).

problems between investors and management,[83] and has in general privileged shareholders among all the corporate constituents. Departures from the doctrine of shareholder value can be found in the work of the Bullock Committee in the 1980s and, more recently, in reforms addressing the directors' account to wider stakeholders.[84] The latter has its roots in the statutory reformulation of the common law directors' fiduciary duty to act *bona fide* for the interest of the company[85] into the "enlightened shareholder value" (ESV) principle encapsulated in section 172 of the UK Companies Act 2006.[86] Section 172 provides a legislative imperative blended with improved information flow and greater disclosure that enables directors to consider wider stakeholder interests when making decisions.[87] The UK stance, therefore, parts course to some degree from the counterpart US shareholder-oriented model,[88] but section 172 lacks behind in terms of setting a true stakeholder mandate.[89] This is despite the recent strengthening of the reporting requirements relating

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[83] For a comprehensive law and economics analysis of English company law, see BRIAN R. CHEFFINS, COMPANY LAW: THEORY, STRUCTURE AND OPERATION (1997).

[84] BULLOCK COMMITTEE, *REPORT OF THE COMMITTEE OF INQUIRY AND INDUSTRIAL DEMOCRACY* (1987); DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY (BEIS), CORPORATE GOVERNANCE REFORM: GREEN PAPER (November 2016), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/584013/corporate-governance-reform-green-paper.pdf; DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY (BEIS), CORPORATE GOVERNANCE REFORM: THE GOVERNMENT RESPONSE TO THE GREEN PAPER CONSULTATION (August 2017), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640631/corporate-governance-reform-government-response.pdf.

[85] Pervical v Wright, 2 Ch. 421 (1902).

[86] Note that UK policymakers have rejected the pluralist approach, a variant of stakeholder theory based on a property analysis of the firm. COMPANY LAW REVIEW MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: DEVELOPING THE FRAMEWORK, LONDON, DTI (2000,); COMPANY LAW REVIEW, MODERN COMPANY LAW FOR A COMPETITIVE ECONOMY: FINAL REPORT para 3.16 (2001); WALKER REVIEW, Annex 3 at 137.

[87] For recent empirical evidence on the effectiveness of strategic reporting in the UK see Irene-Marie Esser, Iain MacNeil and Katarzyna Chalaczkiewicz-Ladna, *Engaging Stakeholders in Corporate Decision-Making through Strategic Reporting: An Empirical Study of FTSE 100 Companies*, 29 EUR. BUS. L. REV. 729 (2018).

[88] For a distinction between the two see CHRISTOPHER BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013).

[89] On the effectiveness of the ESV see, e.g., Sarah Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?*, 17 INTERNATIONAL COMP. & COMM. L. REV., 329 (2006); Georgina Tsagas, *Section 172 of the Companies Act 2006: Desperate Times Call for Soft Law Measures*, in SHAPING THE CORPORATE LANDSCAPE (Nina Böger & Charlotte Villiers eds., 2017).

to section 172,[90] which aim to assist non-shareholder groups in holding company directors to account as part of a broader framework to enable more effective board engagement with the workforce and wider stakeholders in order to gain a better and more grounded understanding of their views.[91] Neither, however, fundamentally changed the UK corporate governance system due to the lack of consensus regarding the desirability of employee participation on company boards.[92] As one of us has argued elsewhere,[93] the recent reforms cannot alone strengthen the way in which the interests of employees, customers and wider stakeholders are considered at board level. This is partly because increasing the stakeholder orientation of UK companies will require a more fundamental "cultural" change, and partly, because UK corporate governance still mainly relies on the combination of transparency, disclosure and market participants' actions to remedy undesirable outcomes. Qualifying such reform as impossible, given the supposedly overwhelming requirement of a wholesale transformation of the prevailing "culture", echoes much else of the corporate governance debate of the late 1990s, which was steeped in seemingly uncompromising positions of ideological opposition.[94] But, time moves on, and the circumstances of the opposition of the "convergence" and "divergence" camps change. While it is too early to provide any reasonable assessment of what a post-Brexit UK culture of corporate governance could look like,[95] the example of Hong Kong's surprising tenacity in opposing a centralist

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[90] *See* Provision 5 of the UK Corporate Governance Code 2018 and section 414CZA of the Companies Act 2006, respectively.

[91] This link between ESV and board composition is manifested in Provision 5 of the UK Corporate Governance Code 2018 itself, which combines the reporting requirements relating to section 172 with three alternative mechanisms to engage with the workforce, that is a director appointed from the workforce, a formal workforce advisory panel or a designated non-executive director.

[92] For more on this long-standing debate, see, e.g., Andrew Gamble & Gavin Kelly, *Shareholder Value and the Stakeholder Debate in the UK*, 9 CORP. GOV. 110 (2001).

[93] Dionysia Katelouzou, Aditi Gupta & Gerhard Schnyder, *More Teeth Needed for Corporate Governance Reforms: Response to the Dept. BEIS Green Paper on Corporate Governance Reform* (2017), *available at* https://ssrn.com/abstract=2921800.

[94] Compare Hansmann & Kraakman, *supra* note 10, and Simon Deakin, *The Coming Transformation of Shareholder Value*, 13 CORP. GOV. 11 (2005).

[95] John Armour, Holger Fleischer, Vanessa Knapp & Martin Winner, *Brexit and Corporate Citizenship*, 18 EUR. BUS. ORG. L. REV., 225 (2017). *See* also PETER SWABEY, CORPORATE GOVERNANCE: THE BREXIT EFFECT, ICSA THE GOVERNANCE INSTITUTE, no date, *available at*: https://www.icsa.org.uk/knowledge/blog/corporate-governance-the-brexit-effect.

Chinese government in the drawn-out summer of 2019 might serve as a reminder of how cultures can change and adapt.[96]

In addition, what requires our attention, is that despite the predominantly shareholder-oriented perspective of corporations and business performance, the UK debate has often arrived at different conclusions in relation to the corporation's obligations and duties to society, which are explained by the fact that UK company law, unlike the US one, is conceptually built on shareholder governance,[97] and UK shareholders – particular institutional investors that have dominated UK public equity since the 1990s – have been portrayed as "stewards"[98] of the companies in which they invest. Yet, what the UK example shows is that scholarly arguments in support of a broader stakeholder mandate were deeply influenced by economic theories. The dissenting pluralist approach in the UK,[99] similar to the team production theory in the US, supports the allocation of governance rights to all the corporate constituents that bear firm-specific risk and is, therefore, normatively different from the more "societal" stakeholder theories of company law as these developed in Continental Europe and Japan in the 20th century.

In Germany and France, for instance, institutional theories of corporate law had a great appeal for most of the 20th century as they were seen as a tool to protect the firm and all of its stakeholders against controlling shareholders' opportunism, an issue that was of little significance in countries with dispersed ownership structures such as the US and the UK.[100] However, institutionalism with its accompanying

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[96] Jean-Philippe Béja, *Is Hong Kong Developing a Democratic Political Culture?*, 2 CHIN. PERSP. 4-12 (2007); Francis F. Lee & Joseph M. Chan, *Making Sense of Participation: The Political Culture of Pro-democracy Demonstrators in Hong Kong*, 193 CHIN. QUART"Y 84 (2008); Chuanli Xia & Fei Shen, *Political Participation in Hong Kong: The Roles of News Media and Online Alternative Media*, 12 INT"L J. COMM. 1569 (2018); Peter Pomarantsev, *The Counteroffensive Against Conspiracy Theories Has Begun,* THE ATLANTIC, 7 August 2019, *available at* https://www.theatlantic.com/international/archive/2019/08/evolution-protests-conspiracy-theories-disinformation/595639/.

[97] *See, e.g.*, CHRISTOPHER BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER 29-36 (2013).

[98] *See infra* Part IV.

[99] *See* further JOHN PARKINSON, CORPORATE POWER AND RESPONSIBILITY (1993); Gavin Kelly & John E. Parkinson*, The Conceptual Foundations of the Company: A Pluralist Approach*, 2 COMP., FIN. & INSOL. L. REV. 174 (1998).

[100] For a good overview of the influence of the theory of the German corporation as "enterprise in itself" (*Unternehmen an sich*) and the French doctrine of the "interest of the association of the corporation" (*intérêt social* or *intérêt de la société*) to the stakeholder orientation of Germany and France, respectively, see Gelter (2011), *supra* note 70, 678 et seq.

stakeholderism seems to have been losing some of its once important status as German corporate governance gradually shifted in the 1990s away from state control and further towards capital markets.[101] One explanatory factor for this could be the internationalization of the debate in the wake of the ECJ case law following the *Centros* case, the rise of regulatory competition and other forces of international convergence.[102]

Japan's corporate governance system, on the other hand, displayed a high degree of "institutional isomorphism", particularly from the 1960s to 1990s, with a strong emphasis on maintaining firm-specific capabilities generated by the investment of stakeholders, such as employees.[103] Despite the substantial changes in corporate governance practices and the related reforms in the past 30 years that aimed to help Japanese firms to adapt their stakeholder model of corporate governance to market pressures, such reforms mainly serve a symbolic function and they do not cut deep. As a result, a complete shift to a shareholder-oriented model of corporate governance is unlikely to take place in Japan.[104]

Having already pointed to some of the limitations of insisting on the "comparative advantages" of different national corporate governance systems without taking into account also the consequences of a financialization and hybridization of transnational corporate law norm creation, the just offered glimpses into the cases of German and Japanese corporate governance suggest that, in effect, context matters. As such, it is important to keep at least some cautious distance to an overly self-fulfilling law-and-economics argument whereby the rise of shareholder value maximization is not only inevitable, but also comprehensive and without alternatives. Scrutinizing the tunnel vision of the dominant, shareholder value-oriented understanding of corporate governance, Lynn Stout found, for instance, that such thinking "drives directors and

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[101] Gregory Jackson, *Continuity and Change in Corporate Governance: Comparing Germany and Japan*, 13 CORP. GOV. 351 (2005); Gregory Jackson, *Stakeholders under Pressure*, 13 CORP. GOV. 419 (2013); see also PHILIP KLAGES, THE CONTRACTUAL TURN: HOW LEGAL ACADEMICS SHAPED CORPORATE LAW REFORMS IN GERMANY (2008) *available at* https://www.semanticscholar.org/paper/The-Contractual-Turn-%3A-How-Legal-Academics-Shaped-Klages/36c0182a983dbbc638bff07847ea807abc85ac9b.

[102] *See infra* Part II.4.

[103] For a detailed account of the traditional Japanese corporate governance system, see e.g. Gregory Jackson and Hideaki Miyajima, *Introduction: The Diversity and Change of Corporate Governance in Japan*, in CORPORATE GOVERNANCE IN JAPAN: INSTITUTIONAL CHANGE AND ORGANIZATIONAL DIVERSITY (Masahiko Aoki, Gregory Jackson & Hideaki Miyajima eds. 2007).

[104] *See*, *e.g.*, SANFORD M. JACOBY, THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN AND THE UNITED STATES (2007).

executives to run public firms like BP with a relentless focus on raising stock price …"[105]

More recent literature, especially in the context of transnational human rights litigation against MNCs and with regard to corporations as part of global value chains, underscores the importance of local context and emphasizes the need to closely scrutinize the relations between corporations and local communities.[106] This orientation casts a new light, on the one hand, on who must be considered as a "stakeholder" and as being affected by the corporation and, on the other, which wider societal and environmental interests may be considered to be in the scope of a corporation's "sphere of influence", a term which, since the failure of the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, was widely perceived as needing further specification and contributed to the mandate for John G. Ruggie as the then newly appointed U.N. Special Representative of the Secretary-General for Business and Human Rights.[107] What both VoC and post-VoC critiques of corporate governance developments show is a much more differentiated and layered landscape of norm production, which cannot adequately be depicted on the basis of uni-directional normative assessments.[108] The same criticism applies to

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[105] LYNN STOUT, THE SHAREHOLDER VALUE MYTH. HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC (2012), 3.

[106] POOJA PARMA, INDIGENEITY AND LEGAL PLURALISM IN INDIA: CLAIMS, HISTORIES, MEANINGS (2015), Christiana Ochoa, *Generating Conflict: Gold, Water and Vulnerable Communities in the Colombian Highlands*, in NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT: INTERNATIONAL ECONOMIC LAW PERSPECTIVES (Celine Tan & Julio Faundez eds. 2017). Lauren Coyle, *Tender Is the Mine: Law, Shadow Rule, and the Public Gaze in Ghana*, in CORPORATE SOCIAL RESPONSIBILITY? HUMAN RIGHTS IN THE NEW GLOBAL ECONOMY (Charlotte Walker-Said and John Kelly eds. 2015).

[107] A helpful, critical discussion is provided by Denis G. Arnold, *Transnational Corporations and the Duty to Respect Basic Human Rights*, 20 BUS. ETHICS QUARTERLY 371-399 (2010). And, *see* John G. Ruggie, The Social Construction of the UN Guiding Principles on Business and Human Rights, *Corporate Responsibility Initiative, Harvard Kennedy School, Working Paper 67/2017*, 11 ("The mandate was modest: to identify and clarify standards and best practices in the area of business and human rights, for both states and business enterprises; to clarify such concepts as "corporate complicity" in human rights abuses committed by a related party, as well as "corporate sphere of influence…").

[108] Ruth V. Aguilera & Cynthia A. Williams, *"Law and Finance": Inaccurate, Incomplete, and Important*, B.Y.U. L. REV., 1413-1434 (2009); *See* also Ronald Gilson, *From Corporate Law to Corporate Governance*, in HANDBOOK OF CORPORATE LAW AND GOVERNANCE (Jeffrey Gordon and Gordon Ringe eds., 2018), at 18 (arguing that such "one-factor corporate governance models are too simple to explain the real-world dynamics we observe").

the comparative corporate governance literature which, as we will show below, evolved around the adaptation of purportedly global standards.

3. "Scholarly Bind Two": Convergence versus Divergence and Harmonization versus Regulatory Competition

Comparative work in corporate governance has been largely shaped by the shareholder value oriented agenda.[109] Despite a widely shared appreciation of corporate law being both an ingredient as well as product of a national legal culture, the last twenty years at least have seen an enormous boost of the idea of there being an overarching set of principles in corporate law which contribute to what many scholars have been describing as a global convergence of corporate governance principles. The law-an-economics narrative has been crucial here as it has been emphasizing agency costs as a core problem being faced across different corporate governance systems.[110] In the background of this debate lies the older and more fundamental distinction of corporate governance systems along the degree to which they may be categorized as being either "outsider/arm's length" or "insider/control oriented" systems.[111] The received wisdom is that the former – characterized by publicly held companies with diffuse share ownership structures – exists in the UK and the US, while the latter – characterized by fewer publicly traded companies per capita and more ownership concentration – predominates in different forms in Continental Europe and Pacific Asia. Under agency theory the primary principal-agent conflict unfolds in a different manner across the two corporate governance systems.[112] The conflict between shareholders and the board of directors is predominant in outsider

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[109] *See, e.g.*, Donald C. Clarke, *"Nothing but Wind?" The Past and Future of Comparative Corporate Governance*, 59 AM. J. COMP. L. 75-110 (2011). For an insightful discussion of the different institutional environments that shape the shareholder value norm, see John Armour, Simon Deakin & Suzanne J. Konzelmann, *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BRITISH J. INDUSTRIAL RELATIONS 531-555 (2003), and Margaret M. Blair, *Shareholder Value, Corporate Governance, and Corporate Performance. A Post-Enron Reassessment of the Conventional Wisdom*, in CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY (Peter K. Cornelius & Bruce Kogut eds., 2003), 53-82.

[110] *See, e.g.*, Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch & Stephan Prigge (eds.), COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH (1998).

[111] Marco Becht and Colin Mayer, *Introduction*, in THE CONTROL OF CORPORATE EUROPE 1 (Fabrizo Barca and Marco Becht eds., 2001), 1.

[112] *See, e.g.*, Lucas Enriques and Paolo Volpin, *Corporate Governance Reforms in Continental Europe*, 21 J. ECON. PERSP. 117 (2007), 122-125.

systems, while in insider systems the dominant agency problem is generated by the conflict between minority and majority shareholders. Despite the agency problem being different, comparative corporate governance literature, especially in the late 1990s, focused on the core agency problem between management and shareholders even in countries with prevailing blockholders, such as Germany.[113] This is even though a separation of ownership and control is the exception worldwide rather than the rule.[114] More recently, the now eleven authors of *The Anatomy of Corporate Law* argue that one of the functions of corporate law (irrespective of the laws of specific jurisdictions) is to minimize coordination costs and agency problems among corporate constituents, including those between managers and shareholders, minority and majority shareholders, and other stakeholders, and they emphasize on the "functional" [115] commonality of legal responses to these problems across different jurisdictions.[116]

As already alluded to, the law-and-economics approach to comparative corporate governance and the associated advancement of the social norm of shareholder primacy[117] was famously epitomized by Hansmann and Kraakman in their highly influential article, "The End of History for Corporate Law". Published just at the turn of the 21st century, the two leading corporate law scholars proclaimed the dominance of the economic-oriented analysis of corporate law and corporate governance, and the convergence towards what they describe as the "Anglo-American

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[113] *See*, *e.g.*, Stephan Prigge, *A Survey of German Corporate Governance,* in COMPARATIVE CORPORATE GOVERNANCE – THE STATE OF THE ART AND EMERGING RESEARCH 943-1044 (Klaus J. Hopt, Hideki Kanda, Mark J. Roe, Eddy Wymeersch and Stephan Prigge eds, 1998).

[114] Rafael L. La Porta, Florencio Lopez-de-Silanes and Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

[115] KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (3d ed 1998), 39-40; R Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmermann eds, 2006).

[116] REINIER KRAAKMAN ET AL, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH, 2-3 (3d ed 2017). This latest edition focuses on seven countries, namely Brazil, France, Germany, Italy, Japan, the UK and the US.

[117] For a distinction between the social norm of shareholder primacy and the legal requirement of shareholder value maximization in the UK and other jurisdictions, see Beate Sjåfjell et al, *Shareholder Primacy: The Main Barrier to Sustainable Companies*, in COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 79 (Beate Sjåfjell & Benjamin J. Richardson eds, 2015).

shareholder-oriented model" of corporate governance.[118] Hansmann and Kraakman emphasized economic (efficient) market considerations based on an accelerated competition among firms over "best practices" triggered by globalization forces,[119] and referred to both *functional* and *formal* convergence with the latter following rather than leading the former.[120] The convergence thesis met with immediate attention and led to a voluminous literature of attack and reply. An early criticism came from Branson who argued that the "The End of History for Corporate Law" consists of "bald assertions" and that any convergence in corporate governance is more likely to be regional rather than global.[121] In a similar vein, Milhaupt argued – on the basis of a property rights analysis – that any convergence of national corporate governance systems will be "slow, sporadic and uncertain".[122] Also, Bratton and McCahery recognized the possibility of an "improved variety of governance systems" or a "set of viable distinctive governance systems" rather than a complete convergence,[123] while, more recently, Gevurtz has contended that corporate convergence through imitation and transplant is occurring but in an incomplete and impermanent rather than linear fashion.[124] On the other side of the spectrum, Hansmann and Kraakman defended the convergence thesis in subsequent writings even after the Enron scandal

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[118] Hansmann & Kraakman, *supra* note 10, 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value").

[119] On the impact of globalization on comparative corporate governance, see Arthur R. Pinto, *Globalization and the Study of Comparative Corporate Governance*, 23 WISCONSIN INTERNATIONAL LAW JOURNAL 477 (2005).

[120] Hansmann & Kraakman, *supra* note 10. On functional convergence, see, further, John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641 (1999); Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329 (2001); John J. Coffee Jr., *Convergence and its critics: what are the preconditions to the separation of ownership and control?*, in CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY (Joseph A. McCahery, Piet Moerland, Theo Raaijmakers and Luc Renneboog eds, 2002).

[121] Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 COR. INT'L L. J. 322 (2001).

[122] Curtis J. Milhaupt, *Property Rights in Firms*, 84 VA. L. REV. 1145 (1998).

[123] William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and Barriers to Global Cross Reference*, in CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY, 23 (Joseph A. McCahery, Piet Moerland, Theo Raaijimakers and Luc Renneboog eds., 2002), 30.

[124] Frank A. Gevurtz, *The Globalization of Corporate Law: The End of History or a Never-Ending Story?,* 86 WASH. L. REV. 475 (2011).

and the GFC,[125] while additional support to the convergence thesis came from the law and finance literature and the influential "legal origin matters" thesis.[126] Yet, subsequent "leximetric" research has challenged the claim that there has been a significant Americanization of other countries' laws and shows that despite global trends law makers are able to deviate from influential models in corporate law and corporate governance.[127]

Similarly, and as we have already discussed in the context of showcasing the contribution made by the VoC school to the corporate governance debate, a number of prominent political theories of comparative corporate governance challenged the main assumptions of the convergence argument. Most prominently, Bebchuk and Roe posited that the social forces and structures that shape legal rules, including history, politics, and ownership structures, are path dependent and will constrain the globalized forces pushing for corporate governance convergence.[128] Extending this line of thought, Schmidt and Spindler added to the analytical mix of path dependence the concept of complementarity which relates to the internal "fit" of the institutional components of a governance system.[129] Because of the complementarity found in both insider and outsider corporate governance systems, Schmidt and Spindler rule out a rapid convergence towards a universally best corporate governance system.[130]

While Schmidt and Spindler analyzed the aspect of complementarity within a (national) corporate governance system, VoC scholars such as Peter Hall and David Soskice have elaborated path-dependent, institutional complementarities between different sub-systems of a

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[125] Henry Hansmann & Reinier Kraakman, *Toward a Single Model of Corporate Law?*, in CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY (Joseph A. McCahery, Piet Moerland, Theo Raaijimakers and Luc Renneboog eds., 2002); Henry Hansmann, *How Close is the End of History?*, 31 J. CORP. L. 745 (2005).

[126] *See*, *e.g.*, Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

[127] Mathias Siems, *Convergence in Corporate Governance: A Leximetric Approach*, 45 J. CORP. L. 729 (2010); Dionysia Katelouzou & Mathias Siems, *Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990-2013*, 15 J. CORP. L. STUD. 127 (2015).

[128] Lucien A. Bebchuk & Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999).

[129] Reiner H. Schmidt & Gerald Spindler, *Path Dependence, Corporate Governance and Complementarity*, 5 INT'L FIN. 311 (2002), 318.

[130] Schmidt & Spindler, *id.*, at 325.

country's or a region's political economy.[131] By distinguishing, as we saw,[132] the political economies of developed Western countries as between Liberal Market Economies (LMEs) and Coordinated Market Economies (CMEs), they were able to paint an arguably more differentiated picture of what *actually* marked up the landscape of corporate governance and its attending trials and tribulations. Importantly, they inquired how firms *coordinate* their activities in five sub-systems of the political economy, including industrial relations, vocational training and education, corporate governance, inter-firm relationships and employees and, based on their findings, argued that the level of coordination between the different sub-systems would make national corporate governance systems (especially CMEs) resilient to convergence.[133] Even though the VoC approach has been criticized on various grounds, including for concentrating too much on firms while paying less attention to other actors such as the state,[134] for focusing only on Western, developed countries,[135] for lumping together common law countries,[136] and for disregarding the tension between path dependency and the need for a particular variety (or sub-variety) of capitalism to adapt to changes in markets and products,[137] VoC had a profound impact on the larger debates around the then still very undecided fate of national political economies under the threat of what Joseph Stiglitz famously called "*The Roaring Nineties*".[138] With a focus on institutional diversity, the VoC scholars explicitly addressed the embedded, historically-grown socio-political and cultural national corporate governance systems and thus underlined the relevance of competitive advantages of national

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[131] An important, earlier contribution to this field was J. Rogers Hollingsworth and Robert Boyer, *Coordination of Economic Actors and Social Systems of Production*, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 1 (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

[132] See *supra* Part II.1.

[133] Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1 (Peter A. Hall & David Soskice eds., 2001).

[134] On the central role that the state still plays in political economies such as France, see Vivien A. Schmidt (2003), *French capitalism transformed, yet still a third variety of capitalism*, 23 ECONOMY AND SOCIETY 526-554.

[135] *But see*, more recently, Andreas Nölke & Simone Claar, *Varieties of capitalism in emerging economies*, 81/82 TRANSFORMATION: CRITICAL PERSPECTIVES ON SOUTH AFRICA 33 (2013).

[136] *But see* Michael A. Witt & Gregory Jackson, *Varieties of capitalism and institutional comparative advantage: A test and reinterpretation*, 47 J. INT'L BUS. STUD. 778 (2016).

[137] Gilson, *supra*, note 108.

[138] JOSEPH E STIGLITZ, THE ROARING NINETIES: A NEW HISTORY OF THE WORLD'S MOST PROSPEROUS DECADE (2003).

differences. Based on these comprehensive findings, which themselves were the result of extensive empirical and quantitative work, they argued against a one-way convergence towards the Anglo-American market-oriented corporate governance system.

While the convergence/divergence conundrum clearly left its mark on the scholarly and policy debates in the late 1990s and early 2000s, being furthermore associated with efforts to "export" Anglo-American corporate governance principles internationally, a slightly different debate began to unfold on the European front, which would soon dominate scholarly discussions for years to come. Just as "quite" in the US means something else than "quite" in the UK, federalism, harmonization and regulatory competition meant very different things in the US and the European Union. From an early point onwards, the varied history of European corporate law exposed the challenges of harmonization,[139] given the extensive differences in locally rooted and historically grown and consolidated company law systems across Europe.[140] In comparison, this constellation looked very different from the history and experience of US-style regulatory competition.[141] While the polarities between the US pattern of competitive federalism and the different conflict of laws regimes of the EU Member States had occupied scholars for a long time, the debate over the exportability of the US-style regulatory competition took a different turn in light of the European Court of Justice's case law on the free movement of companies. Following the *Centros* line of cases around the turn of the 21st century, the introduction of a Delaware-type form of inter-jurisdictional competition among EU Member States' company laws metamorphosed into a pressing actuality, with severe repercussions on EU Member States' diversity.[142] As a result, European

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[139] The failed attempts to harmonize board structures in the EU with the 5th company law directive and the trembled history of the Takeover Directive and the European Company Statute, respectively, tell an important story in that regard. *See*, *e.g.*, Martin Gelter, *EU Company Law Harmonization between Convergence and Varieties of Capitalism*, 255/2017 ECGI WORKING PAPER (June 2017), *available at* https://ecgi.global/sites/default/files/working_papers/documents/3552017.pdf; Peer Zumbansen, *European Corporate Law and National Divergences: The Case of Takeover Regulation*, 3 WASH. U. GLOB. STUD. L. REV., 867 (2004).

[140] Antoine Réberioux, *European Style of Corporate Governance at the Crossroads*, 40 JOURNAL OF COMMON MARKET STUDIES, 111-134 (2002): 111-134; GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010), ch. 4.

[141] *See*, *e.g.*, David Charny, *Competition among Jurisdictions in Formulating Corporate Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L. J. 423 (1991).

[142] Simon Deakin, *Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economics Perspective on Centros*, 2 CAMB. YB.

corporate law and European corporate governance tended to be squeezed into a uncomfortable either-or position with choices between harmonization and regulatory competition and between shareholder primacy and stakeholder theories, largely reflecting the tension between the market integration project, on the one hand, and the ambition of (certain) Member States to boost national champions, on the other.[143]

3. "Scholarly Bind Three": Private Ordering and the Binary Distinction between "Hard" and "Soft" Law

There can be no doubt that, along with its impact on national, international and comparative debates about the purpose of the corporation and corporate governance reforms, the law-and-economics approach to corporate governance provided strong support for the argument regarding the superiority of private and decentralized methods of internal governance at the micro (individual firm) level over public policy. One of the principal normative achievements of the "private ordering" or "contractarian" theory of the firm is the treatment of corporate law and corporate governance regulation as contractually determinable and market facilitative private law, rather than public regulatory law.[144] The explicitly anti-regulatory bias fit the time and had not much trouble prevailing in policy and scholarly circles, as corporate governance regulation displayed an increasing reliance on market-based, privately created best practice norms, codes, standards and recommendations. The proliferation of national as well as company-specific corporate governance codes,[145] codes of conduct,[146] statements of

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EUR. LEG. STUD. 231 (2000). *But see* John Armour, *Who Should Make Corporate Law? EC Legislation versus Regulatory Competition?*, 58 CURR. LEG. PROB. 369 (2005).

[143] For an insightful, retrospective assessment, see Stefano Lombardo, *Regulatory Competition in European Company Law: Where Do We Stand Twenty Years After Centros?*, 452/2019 ECGI WORKING PAPER (May 2019), online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3392502. with regard to the "Volkswagen" landmark decision by the European Court of Justice, *see* Peer Zumbansen & Daniel Saam, *The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism*, 8 GER. L. J. 1027 (2007).

[144] For a famous and biting critique, see William W. Bratton*, The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 COR. L. REV. 406 (1989).

[145] Ruth Aguilera and Alvaro Cuervo-Caruzza, *Codes of Good Governance Worldwide: What is the Trigger?*, 25 ORG. STUD. 415 (2004).

[146] *See*, *e.g.*, Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. LEG. STUD. 617 (2011).

"good" or "recommended" practices by international organizations,[147] and more recently stewardship codes for institutional investors[148] testify to the growing consensus around a more indirect approach to "regulating" corporate actors by enabling, encouraging and nudging them to use their internal structures and processes, particularly the board of directors and, more recently, the shareholders to formulate self-regulatory regimes rather than turning to "the state" to issue strong commands.

Where did it start? Arguably, the UK Cadbury Report[149] is seen as an important milestone in the more recent history of corporate governance regulation. Shortly after being issued, the Cadbury Report resonated around the world, triggering a true surge of comparable "regulatory" initiatives.[150] Corporate governance codes have developed out of the interactions of governmental or quasi-governmental entities, stock exchanges, the business, academic and industry communities, and investor-related groups as a response to corporate catastrophes,[151] and have proliferated across more than sixty countries recommending detailed governance frameworks mostly for publicly listed companies.[152] Even though they vary considerably in terms of content, legal status and origin, a distinctive feature of these codes is their extensive resort to (perceivably, at least) non-statist, non-binding "soft-law" techniques, which provide flexibility and responsiveness to individual, firm-level circumstances while keeping regulating detail to a minimum. This feature is prominently manifested in the UK Corporate Governance Code 2018 (and its previous versions) the enforcement of which rests on the

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[147] *See*, *e.g.*, THE G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (updated 2015), *available at*: https://www.oecd.org/corporate/principles-corporate-governance.htm.

[148] *See infra* Part IV.

[149] ADRIAN CADBURY, COMMITTEE ON FINANCIAL ASPECTS OF CORPORATE GOVERNANCE: FINAL REPORT (1992), *available at* https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf.

[150] Cally Jordan, *Cadbury Twenty Years On*, 58 VILL. L. REV. 1 (2013).

[151] Holly J. Gregory & Robert T. Simmelkjaer, *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States*, FINAL REPORT ON BEHALF OF THE EUROPEAN COMMISSION (2002), *available at* https://ecgi.global/code/comparative-study-corporate-governance-codes-relevant-european-union-and-its-member-states. And, fast-forwarding to the time after the 2008 crisis and the tension over the choice between codes and "hard law", see, e.g., Dimity Kingsford Smith, *Governing the Corporation: The Role of "Soft Regulation",* 35 U. N. S. W. L. J., 378 (2012), and Aidan O'Dwyer, *Corporate Governance after the financial crisis: The role of shareholders in monitoring the activities of the board*, 5 ABERDEEN STUD. L. REV. 112 (2014).

[152] The European Corporate Governance Institute maintains a list of most of the corporate governance codes that have been released worldwide: http://www.ecgi.org/codes/all_codes.php.

investor-driven practice of "comply-or-explain".[153] The "comply or explain" enforcement mode, in turn, rests upon two pillars: a sufficiently high-quality disclosure by companies and an informed evaluation of the perceived compliance or non-compliance by the companies' shareholders (especially institutional ones) and the market. "Comply or explain" is, therefore, an "obligation" to shareholders (not regulators) to make an informed evaluation as to whether non-compliance is justified given the company's particular circumstances and then to take action in cases of non-conformance or poor explanations. While much ink has been spilled on the effectiveness of the comply-or-explain system with many good arguments on both sides,[154] what is less explored is the degree of coerciveness of this investor-determinable norm production and enforcement, which is generally assumed to be entirely voluntary.

Prior literature notably speaks in binary (either soft or hard law) terms and mostly associates "soft law" with informal, non-binding norms generated through non-statist processes.[155] The lack of any state involvement in the initiation and/or monitoring and enforcement is for most seen as critical to soft norms, and has sometimes raised concerns about the legitimacy of non-state-made, soft law.[156] Others emphasize on the nature of legal norms and equate soft law with voluntary, non-binding rules.[157] This presumable lack of express legalization of soft law (namely its alleged lack of enforceability) has been the key dimension between the early corporate governance codes and best practices, on the one hand, and traditional company law, one the other, with the latter being highly regulatory in nature, containing many mandatory rules.[158] This binary

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[153] Financial Reporting Council, UK CORPORATE GOVERNANCE CODE, July 2018, *available at*: https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF.

[154] *See*, *e.g.*, Andrew Keay, *Comply or explain in corporate governance codes: in need of greater regulatory oversight*?, 34 LEG. STUD. 279 (2014). For an analysis of the introduction of the comply-or-explain rule in the German Stock Corporation Law, see David Seidl, Paul Sanderson & John Roberts, *Applying "Comply or Explain": Conformance with Codes of Corporate Governance in the UK and Germany*, CENTRE FOR BUSINESS RESEARCH, UNIVERSITY OF CAMBRIDGE, WORKING PAPER NO. 389 (2009), online.

[155] Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in THE CONSTRUCTION OF EUROPE (Stephen Martin ed., 1994), 198; Silvia Karlsson-Vinkhuyzen & Antto Vihma, *Comparing the legitimacy and effectiveness of global hard and soft law: an analytical framework*, 3 REG. & GOV. 400 (2009).

[156] Jan Klabbers, *The Redundancy of Soft Law*, 65 NORD. J. INT'L L. 167 (1996).

[157] Francis Snyder, *supra* note 155, at 146.

[158] On this dichotomy in the context of US corporate law, see John C. Coffee Jr, *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989).

distinction between hard and soft law has been also contextualized against the background of a fundamental transformation of the regulatory state in the name of decentralization, privatization, and marketization, leading to institutional and normative pluralism.[159]

We argue that soft legal norms, in the sense that they do not emanate from traditional authoritative sources, have nevertheless become an important regulatory tool in corporate governance regulation with far-reaching and often more coercive implications than traditional regulatory theories suggest. Soft corporate governance norms do not lack force and effect and they cannot be flouted without consequences.[160] For example, a common misapprehension regarding the UK Corporate Governance Code is that it is an example of "private" law making or self-regulation. What needs to be recognized, however, is that while the code is promulgated and administered by the Financial Reporting Council which itself has no statutory footing (at least for now),[161] it is still dependent on the regulatory state, insofar as it is expressly sanctioned by the government, through the UK's Listing Authority, the Financial Conduct Authority (FCA).[162] Therefore, despite the apparent voluntariness of the Code's provisions and the market-dependency of its enforcement, the FCA's delegated statutory powers to enforce the comply-or-explain obligation have a significant coercive element.[163] This

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[159] Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in THE POLITICS OF REGULATION AND DEVELOPMENT 145 (Jacint Jordana & David Levi-Faur eds, 2004).

[160] Peer Zumbansen, *The Privatization of Company Law? Corporate Governance Codes and Commercial Self Regulation*, 3 JURIDIKUM 32 (2002).

[161] *But see* the current transition from the FRC to the new regulator, the Audit, Reporting and Governance Authority (ARGA) which will be accountable to the Parliament: DEPARTMENT FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY, INDEPENDENT REVIEW OF THE FINANCIAL REPORTING COUNCIL: INITIAL CONSULTATION ON THE RECOMMENDATIONS (March 2019), *available at* https://www.gov.uk/government/consultations/independent-review-of-the-financial-reporting-council-initial-consultation-on-recommendations; FINANCIAL REPORTING COUNCIL, PLAN & BUDGET 2019/20 (May 2019), *available at* https://www.frc.org.uk/getattachment/44ad6509-5fb8-4645-b945-5fcee5689290/Final-FRC-Plan-Budget-May-2019.pdf

[162] UK FCA Listing Rules, 9.

[163] Regarding the low degree of enforced sanctions by the FCA, see John Armour, *Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment* (2008), ECGI Working Paper No. 106/2008 (April 2008), available at https://ssrn.com/abstract=1133542. *See*, by comparison, the regulatory practice in the context of the *German Stock Corporation Act*, sec. 161 (1) sent. 2: Holger Fleischer, *A Guide to German Company Law for International Lawyers – Distinctive Features, Particularities, Idiosyncrasies*, MAX PLANCK PRIVATE LAW RESEARCH PAPER NO. 15/8

approach to corporate governance regulation is, therefore, incorrectly described as private or self-regulation, and can be more appropriately regarded as "associationism", "co-regulation" or as a form of "regulated autonomy" which is exercised by the market but is supported by state-ordered regulation.[164] The tendency of most of the previous corporate governance literature[165] to overlook these implications reflects an incomplete understanding of soft law – both its impact on individual companies and stakeholders at the micro (individual firm) level and on financial markets at the macro level – and of the unique institutional ecosystem in which it operates and fails to capture the full range of options that lie between the polar extremes of state-made/binding norms and non-state-made/non-binding ones.[166]

III. THE POST-GFC "NEW NORMAL": THE CONSOLIDATION OF HYBRID TRANSNATIONAL CORPORATE GOVERNANCE

Up until this point, we have seen how the central debates of shareholder primacy versus stakeholder welfare, convergence versus divergence, harmonization versus regulatory competition and soft- versus hard-law manifest the survival struggle of national corporate governance systems to adapt to purportedly global standards of shareholder-driven governance practices. But in the post-GFC world the acontextual and universal superiority of shareholder primacy is less easily accepted by scholars and practitioners alike.[167] While the "normative" embers of both the shareholder primacy norm and the stakeholder theory still smolder today, one of the key aspects of corporate governance regulation of the 21st century is the increasing emphasis on the what might (again) be called the "public" dimension of the corporation and of the law relating to it in the unfolding political economies of regulatory corporate governance.[168] The current demands for a reconceptualization of the corporation and of

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(2015), 3-25, at 12, *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597062#.

[164] *See*, *e.g.*, John Holland, *Self regulation and the financial aspects of corporate governance*, J. BUS. L. 127 (1996).

[165] For a notable exception see MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE (2013).

[166] In this regard, see the important study by ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES. ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW (2015).

[167] *See*, *e.g.*, the contributions to César Rodriguez-Garavito (ed.), BUSINESS AND HUMAN RIGHTS. BEYOND THE END OF THE BEGINNING (2017), and to Surya Deva & David Bilchitz (eds.), BUILDING A TREATY ON BUSINESS AND HUMAN RIGHTS (2017).

[168] *See supra* Part II.1.

corporate law have come a long way from the CSR stand-offs in the early 1930s but also since the convergence/divergence discussion in the 1990s and early 2000s.

Today, what was previously thought as an exclusively shareholder-driven regulatory area, is being reshaped by a comprehensive and far-reaching critique of what the corporation *is*, *does* and *for whom*. The historical and socio-cultural embeddedness of long developed national corporate governance systems is beginning to make inroads into the debate over the alleged "convergence" of corporate governance standards around the world or the prospects of continuing "divergencies". This notably invokes consideration of Polanyi's powerful argument about the "double movement" of market economy, in which the laissez-faire movement expands the scope of the self-regulating market, and society reacts against this subordination to (re)-embed market forces in social institutions.[169] But despite mounting evidence that the corporate governance terrain continues to expand in a significant manner in terms of its substantive scope and its geographical relevance, there remain considerable misconceptions and communication gaps between the conventional debate, as it were, and the increasingly diversified camp of critics. For instance, while the VoC approach and its refinements changed the normative overtone of these debates, it is our view that its dominant focus on national institutional structures is ill-suited to address the challenges posed by the significant transformation of corporate law-making in the 21st century, including the substantial privatization of norm-making in corporate law and corporate governance in recent years and the influence of international actors, such as the OECD, the World Bank, the United Nations, but also private actors and wider civil society in corporate governance law-making. At the same time, while not always related to corporate governance rules as such, the intensifying public awareness of Western multinationals' connections with egregious labor and human rights violations in their supply chains has been an important factor in driving regulatory and adjudicatory initiatives in recent years.[170] An important dimension of this development is the high degree of

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[169] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME, (2001), 138.

[170] Laura Knöpfel, *CSR Communication in Transnational Human Rights Litigations Against Parent Companies*, *TLI Think*! *Paper* 1/2019, *available at* https://ssrn.com/abstract=3311545; Justine Nolan & Gregory Bott, *Global supply chains and human rights: spotlight on forced labour and modern slavery practices*, 24 AUSTRALIAN J. HUMAN RIGHTS 44-69 (2018).

interpenetration between hard and soft, domestic and international norms in this context.[171]

While there is no doubt that the privatization of norm-making in the field of corporate governance is currently deepening and will continue, it is important to recognize how public actors continue to both intervene and steer but also to engage with private actors in carving out a redefined role in facilitating new relationships between corporate actors and labor groups and consumers.[172] In addition, while corporate law scholars began recognizing the growing prominence of soft law in corporate governance regulation (especially with regard to corporate governance codes and codes of conduct), only rarely was the step taken to actively embrace soft law as a new mechanism of regulation.[173] In age of an increasing reliance on public monitoring and "governance through disclosure" and transparency, it comes as little surprise, that soft law norms aiming at companies' self-imposed (or, mandated) obligations to disclose their activities, earnings as well as their labor practices down to their subsidiaries and contractors figure prominently.[174] The expansion of soft law into more and more areas of corporate conduct requires a more skeptical stance towards the alleged option of choosing *between* hard and soft law. As John Ruggie, then Special Rapporteur of the U.N. Special Secretary on Business and Human Rights and responsible author of the *Guiding Principles*, published in 2011, observed: "…in light of the multinationals power, authority, and relative autonomy, the time-worn

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[171] *See*, *e.g.*, International Bar Association, *Reference Annex to the IBA Practical Guide on Business and Human Rights for Business Lawyers*, 2016, at 5-6, *available at* https://www.ibanet.org/LPRU/Reference-Annex-to-the-IBA-Practical-Guide.aspx. *See* the foundational "Guiding Principles": John Ruggie, *U.N. Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, (Geneva: Human Rights Council, 21 March 2011), available at https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

[172] Examples of multi-stakeholder processes of negotiating and developing regulatory reform often-times emerge in contexts where the relationship between state and private actors is already fought and also shaped by the dynamics and constraints of foreign investment: see, e.g., Manoj Dias-Abey, *Using Law to Support Social Movement-Led Collective Bargaining Structures in Supply Chains*, 32 AUSTRAL. J. LAB. L. 123 (2019) and Ronald C. Brown, *Up and Down the Multinational Corporations" Global Labor Supply Chains: Making Remedies that Work in China*, 34 PACIFIC BASIN L. J. 103-133 (2017).

[173] *See*, *e.g.*, Kevin Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 BROOK. J. INT'L L. 4148 (2010), 48 (arguing that "[s]oft law is a novel mechanism for constraining corporate behavior. In reconciling financial and social imperatives, firms must consider its impact on reputational capital").

[174] Aaron Dhir, *Politics of Knowledge Dissemination: Corporate Reporting, Shareholder Voice, and Human Rights*, 47 OSGOODE H. L. J. 47 (2009); Galit Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT'L. L. J. 419 (2015).

mandatory/voluntary dichotomy inhibits rather than advances our coming to grips with the challenges posed by corporate globalization."[175] In effect, today's regulatory toolbox of corporate governance is not necessarily limited between hard and soft law choices as such. Instead, we need to see corporate governance norm creation against the background which we sketched at the start of our study: rather than testifying to a wholesale "retreat" or even "end" of the state, contemporary governance dynamics unfold in a transnational realm in which states, private actors, civil society groups, and a myriad of interest groups are competing with one another for knowledge, participation and, certainly, power. As a result, traditional national, comparative or international approaches no longer offer the necessary analytical and conceptual tools to map the complex regulatory landscape which has been forming before our eyes. This landscape is marked by a proliferation of more and more hybrid norm-making in the context of highly specialized, sector-specific and yet functionally structured, spatial, de-territorialized regimes which are not confined to national or regional boundaries. Nation states no longer have – if they ever did – a monopoly on regulating the way companies, both MNCs and domestic alike, are controlled and held accountable, while the shift from state-centered government to an increasingly fragmented system of self-steering by public and private actors continues.[176]

Still, while the binary categorization of norms as *hard* or *soft* remains relevant in distinguishing between different enforcement mechanisms and with regard to the legitimacy basis that is being claimed for a particular norm,[177] it is less effective as regards the actual *performative* role played by these norms and the actors engaged in their production.[178] Corporate governance 'regulation' today encompasses both a host of institutional/normative and symbolic dimensions. As such, the "spaces"[179] of corporate governance have different material qualities: while they are shaping and are being shaped by various public and private actors in the actual creation of new and innovative processes of norm-generation, these spaces are also epistemic realms which consist of self-referential discursive processes and logics. An adequate analysis of these

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[175] John Ruggie, *Multinationals as global institution: Power, authority and relative autonomy*, 12 REGULATION & GOVERNANCE 317-333 (2017), 329-330. *See* U.N. Guiding Principles, *supra* note 171.

[176] Gunther Teubner (ed.), GLOBAL LAW WITHOUT A STATE (1997).

[177] *See* also *infra* Part II.4.

[178] *See* the critical assessment by Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order,* 34 J. L. & SOC'Y 116 (2007).

[179] SASSEN, *supra* note 6.

materialities must draw on insights by governance and regime scholars who emphasize not only that hard and soft law are best seen as choices along a continuum[180] and emphasize that soft law can no more remain confined to rules of conduct which are believed to have no legally binding force.[181] In addition, we must acknowledge the power which is concentrated in and perpetuated by – dominant – discursive regimes, which, as we saw in the example of the law & economics narrative of corporate governance, effectively create a justification framework seen as value neutral and objective. As has been shown again and again[182], the so-called 'end of history' and its related allegation of a global triumph of shareholder value maximization 'works' because its narrow premises are hidden from view.

Meanwhile, beyond the scholarly debate around corporate law and corporate governance, a broader, rich and growing literature aims at addressing the increasingly profuse normative and regulatory mosaic that forms against the background of the state's changing regulatory role,[183] and prompts the reconceptualization of law and regulation through notions of transnational law,[184] global law[185] and legal pluralism.[186] Irrespective of the terminological debate,[187] legal, social and political thinkers have been mobilizing a rich array of approaches to address the changing face of legal (private and public) regulation in globally integrated markets. Arguably, corporate governance regulation has been a latecomer to this dynamic scholarly discussion of the dynamic

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[180] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010).

[181] Klaas Hendrik Eller, *Private governance of global value chains from within: lessons from and for transnational law*, 8 TRANS'L LEG. TH. 296 (2017).

[182] *See*, *e.g.*, STOUT, *supra* note 105. Deakin & Konzelmann, *supra* note 109.

[183] *See*, *e.g.*, Shaffer, *supra* note 9, and Peer Zumbansen, *Rethinking the Nature of the Firm: The Corporation as a Governance Object,* 35 SEATTLE L. REV. 1469 (2012).

[184] PHILIP JESSUP TRANSNATIONAL LAW (1956); Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 Trans'l L. & Cont. Prob. 305; César Arjona, *Transnational Law as an Excuse: How Teaching Law Without the State Makes Legal Education Better*, ESADE Working Paper No. 219 (October 2011), *available at* https://ssrn.com/abstract=1940274.

[185] GIULIANA ZICCARDI CAPALDO, THE PILLARS OF GLOBAL LAW (2008); RAPHAEL DOMINGO THE NEW GLOBAL LAW (2010).

[186] Teubner, *Self-Constitutionalizing TNCs*, *supra* note 146; PAUL SCHIFF BERMAN GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012).

[187] *See* the insightful critique by Frank Garcia, *Globalization's Law: Transnational, Global or Both?* in THE GLOBAL COMMUNITY YEARBOOK OF INTERNATIONAL LAW AND JURISPRUDENCE 2015 (Giuliana Ziccardi Capaldo ed., 2016).

nature of private regulation which has mainly focused on other non-public law fields, including consumer protection, labor regulation, finance, banking, human rights, environmental regulation, accounting standards, and e-commerce.[188]

The here made suggestion of thinking of corporate governance as a *transnational regulatory field* and of approaching it from a legal pluralist perspective[189] builds on the insights of VoC and comparative political economy scholars but reads them against the background of a longer-standing critique of the all-too-often assumed exclusionary status of law as originating in and from the state. In contrast, when we study corporate governance through the lens of transnational legal methodology and legal pluralism with a focus on the *actual* actors, norms and processes that make up the field, the intricate relations between formal and informal, "public" and "private", hard and soft law norms which make up the multiple and spatialized political economies of corporate governance regulation today become visible.[190] The transnational dimension of public and private actors, the newly emerging legal and social forms of norms and the multi-level rule-setting processes radicalize the "semi-autonomous" nature[191] of transnational corporate governance regulation and reveal the tension between binding state-law, on the one hand, and market-based, but still not necessarily non-binding "law", on the other.[192]

It is against this background that the outdated scholarly depictions of the traditional corporate governance debates of the past decades unfold

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[188] For a transnational discourse of other areas of private law, see, e.g. Fabbrizio Cafaggi, *The Many Features of Transnational Private Rule-Making: Unexplored Relationships between Custom, Jura Mercatorum and Global Private Regulation*, 36 U. PA. J. INT'L L. 875 (2015).

[189] Peer Zumbansen, *"New Governance" in European Corporate Law Regulation as Transnational Legal Pluralism*, 15 EUR. L. J. 246 (2009); *see* also Peer Zumbansen, *Transnational Legal Pluralism*, 1 TRANS'L LEG. TH. 141 (2010).

[190] *See* Peer Zumbansen, Lochner *Disembedded: The Anxieties of Law in a Global Context*, 20 IND. J. GLOB. LEG. STUD. 29 (2013); *idem*, *The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy*, in: THE CHALLENGES OF GLOBAL AND LOCAL LEGAL PLURALISM: MEDIATING STATE AND NON-STATE LAW (Michael Helfand ed., 2014); and *idem*, *Transnational Law, With and Beyond Jessup*, in THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP"S BOLD PROPOSAL (Peer Zumbansen ed., 2020, *in press*).

[191] This notion goes back, of course, to Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 L. & SOC'Y REV. 719 (1973).

[192] *See* Jaakko Salminen, *Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities*, IND. J. GLOB. LEG. STUD. 709 (2016); Eller, *supra* note 181; Peer Zumbansen, *Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. L. & SOC'Y, 50 (2011).

and need to be read with considerable skepticism. In response, we suggest revitalizing the idea of the 'embeddedness' of corporations within the social and political system, albeit under present-day conditions.[193] In that regard, we have to acknowledge the challenges that arise for a project which seeks to track and trace the corporation in a complex, historical, cultural, political and legal context. This inevitably leads into difficult questions of sociology in a context that Luhmann and others[194] have called the "world society" – which is both multi-level and trans-territorialized and whose defining feature is the radical fragmentation of systems across different governing rationalities.[195] While being grounded in parts of the VoC story of corporate law and corporate governance, the analysis of the "*transnationally* embedded firm" can be presented as a counter model to the largely financialized firm, insofar the latter is too often rendered as completely detached from the physical, geographical and, well, legal environment in which we see it operating.[196] Taking this analytical lens is even more important in light of the rise and ensuing transformation of the post-regulatory state since the 1980s and the rise of the surveillance society in recent times.[197] It is with these constellations in mind, that we hope to make sense of the particular modalities of today's law-making capacities of the "state" and the "market" against the background of intertwining domestic and transnational, public and

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[193] *See* Sabine Frerichs, *Transnational Law and Economic Sociology*, in: OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer Zumbansen ed., 2020, *forthcoming*). *See* already Sabine Frerichs, *Re-embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law*, in KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 65 (Christian Joerges & Josef Falke eds., 2011). *See*, of course, KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2nd ed, 2001); Robert Boyer & J. Rogers Hollingsworth, *From National Embeddedness to Spatial and Institutional Nestedness*, in CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS 433 (Robert Boyer & J. Rogers Hollingworth eds., 1997).

[194] Niklas Luhmann, *The World Society as a Social System*, 8 INT"L J. GEN. SYST. 131 (1982); John W. Meyer et al, *World Society and the Nation-State*, 103 AM. J. SOCIOL. 144 (1997); CALLIESS & ZUMBANSEN, *supra* note 140.

[195] Peer Zumbansen, *The Next "Great Transformation"? The Double Movement in Transnational Corporate Governance and Capital Markets Regulation*, in KARL POLANYI: GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS 181 (Christian Joerges & Josef Falke eds., 2011) at 6.

[196] On the embeddedness of corporations and corporate governance systems see SANFORD M. JACOBY, THE EMBEDDED CORPORATION: CORPORATE GOVERNANCE AND EMPLOYMENT RELATIONS IN JAPAN AND THE UNITED STATES (2007); and the contributions to THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOR AND FINANCE CAPITALISM (Cynthia Williams & Peer Zumbansen eds., 2011).

[197] *See*, *e.g.*, ZUBOFF, *supra* note 13.

private, state and non-state law-making processes.[198] We do not suggest, however, that, as is the much-used cliché before and after neoliberalism, "the market" steps into the role of the most influential actor to diminish if not to displace the state. Instead, our suggestion is to take into consideration the complex interplay between a corporation's locally embedded stakeholders, including respective host governments, on the one hand, and an immensely diversified as well as spatially diffused, transnational set of claimants of rights towards and in the corporation, on the other. From that perspective, the corporation is no longer a token in a relatively clean-cut ideological struggle between "state" and "market" à la Hayek, Friedman or Zuckerberg, but rather a crucial organizational platform and policy arena which is rife with regulatory potential and vivacity – from inside and beyond.

IV. The Emerging Legal Doctrine and Legal Theory of Transnational Corporate Governance: Shareholder Stewardship as Case in Point

As is often said, *verba docent, exempla trahunt*. As such, we shall now turn to our case study. The recent regulatory initiative around the concept of shareholder stewardship, which we will now focus on, is illustrative of the fundamentally transnational nature of the normative evolution of corporate governance today. The meteoric growth in the presence of institutional investors, such as pension funds, open-end mutual funds, index funds and hedge funds, in global equity markets in the last three decades, and the changing corporate governance practices (ranging from informal forms of shareholder engagement to more aggressive forms of hedge fund activism)[199] prompted the resurrection of the old corporate governance scholarly dogma of "shareholders as monitors".[200] Inspired by

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[198] On the much larger debate today over how to negotiate the relationship between state power and market power, between democratic governance and economic activity see Wolfgang Merkel, *Is capitalism compatible with democracy?*, 8 Zeitschrift für Vergleichende Politikwissenschaft 109-128 (2014); Dani Rodrik, The Globalization Paradox. Democracy and the Future of the World Economy (2011).

[199] *See*, *e.g.*, Dionysia Katelouzou, *Myths and Realities of Hedge Fund Activism: Some Empirical Evidence*, 7 Va. Bus. & L. Rev. 459 (2013). For a recent account of shareholder activism, see Assaf Hamdani & Sharon Hannes, *The Future of Shareholder Activism*, 99 B.U. L. Rev. 971 (2019).

[200] For an analysis of the changed nature of shareholders in recent decades, see *Dionysia Katelouzou Reflections on the Nature of the Public Corporation in an Era of Shareholder Activism and Stewardship* in Understanding the Company: Corporate Governance and Theory, 117-144 (Barnali Choudhury and Martin Petrin, eds. 2018).

law-and-economic theories, scholars put forward the idea that institutional shareholders, especially pension funds, have the skills and incentives to engage in efforts to influence or discipline managerial activity.[201] Post-GFC, however, such benign assumptions with regards to an effective monitoring function attributed to institutional shareholders have not always fared perfectly well. While some were concerned with the purported ability of institutional investors, especially hedge funds, to influence companies at their own benefit,[202] others have been pressing the need to address investors' short-termism and myopia as well as the challenges posed by the increasing equity intermediation.[203] This transformed the prevailing narrative relating to the corporate governance role of institutional shareholders, and currently it is widely accepted, especially in policy circles, that institutional shareholders' engagement is a desirable corporate governance attribute only when it ensures long-term returns for both beneficiaries (investment management) and shareholders (corporate governance) and advances social responsibility.[204]

It is within this ideological and institutional framework that post-GFC corporate governance reforms aiming at encouraging institutional shareholders to actively engage with their investee companies while promoting long-term corporate performance and become active "stewards" have emerged. Firstly inaugurated by Sir Walker in his 2009 review of corporate governance in UK banks and other financial institutions,[205] and manifested in the UK Stewardship Code, (UK Code

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[201] *See*, *e.g.*, Bernard Black, *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277-1368 (1991); John C. Coffee Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277-1368 (1991); Gilson and Kraakman, *supra note* 65. Note, however, that team production theorists and those who view directors as stewards do not see the role of shareholder monitoring as being essential to the health of a company's corporate governance. *See*, *e.g.*, Blair & Stout, *supra* note 68; James H. Davis, F. David Schoorman & Lex Donaldson, *Toward a stewardship theory of management*, 22 ACAD. MGT. REV. 20 (1997).

[202] Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255 (2008).

[203] *See*, *e.g.*, Alan Dignam, *The Future of Shareholder Democracy in the Shadow of the Financial Crisis*, 36 SEATTLE U. L. REV. 639-94 (2013). But *see* Joseph McCahery, Zacharias Sautner and Laura T. Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. FIN.2905, 2915 (2016) for recent findings supporting the view that shareholder activism is not driven by short-term myopic investors.

[204] *See*, *e.g.*, Iris H-Y Chiu, *Turning Institutional Investors into "Stewards": Exploring the Meaning and Objectives of "Stewardship"*, CURRENT LEGAL PROBS. 1 (2013).

[205] DAVID WALKER, A REVIEW OF CORPORATE GOVERNANCE IN UK BANKS AND OTHER FINANCIAL INDUSTRY ENTITIES: FINAL RECOMMENDATIONS (2009), *available at*

hereinafter) introduced in 2010 and revised in 2012 and 2019,[206] shareholder stewardship refers to constructive shareholder engagement and monitoring of companies on the part of asset managers and asset owners for the long-term interests of their beneficiaries, their investee companies and the society as a whole. This idea that institutional investors should behave as long-term oriented "stewards" has caught on globally. Ten years after the launch of the landmark UK Code stewardship codes can be found in a number of other countries in Europe, i.e. Denmark,[207] Italy,[208] the Netherlands,[209] Norway[210] and Switzerland,[211] and as a basis for the amended EU Shareholder Rights Directive 2017 (SRD II),[212] but also as far as Australia,[213] Brazil,[214]

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http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf.

[206] FIN. REPORTING COUNCIL THE UK STEWARDSHIP CODE (2012), *available at* https://www.frc.org.uk/getattachment/e2db042e-120b-4e4e-bdc7-d540923533a6/UK-Stewardship-Code-September-2012.aspx. For the 2020 version, see https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Final2.pdf.

[207] THE COMMITTEE ON CORPORATE GOVERNANCE, STEWARDSHIP CODE (2016), *available at* https://corporategovernance.dk/sites/default/files/erst_247_opsaetning_af_anbefalinger_for_aktivt_ejerskab_uk_2k8.pdf.

[208] ASSOGESTIONI, ITALIAN STEWARDSHIP PRINCIPLES FOR THE EXERCISE OF ADMINISTRATIVE AND VOTING RIGHTS IN LISTED COMPANIES (2016), *available at* https://www.assogestioni.it/sites/default/files/docs/principi_ita_stewardship072019.pdf.

[209] EUMEDION, DUTCH STEWARDSHIP CODE (2018), *available at* https://www.eumedion.nl/nl/public/kennisbank/best-practices/2017-09-consultatiedocument-stewardship-code.pdf.

[210] THE NORWEGIAN FUND AND ASSET MANAGER ASSOCIATION (VFF), THE PRINCIPLES OF THE INDUSTRY RECOMMENDATION ON EXERCISE OF OWNERSHIP (*Verdipapirfondenes forening, Bransjeanbefaling for medlemmene i Verdipapirfondenes forening: Utøvelse av eierskap*) (2020), *available at* https://vff.no/assets/Bransjeanbefaling-ut%C3%B8velse-av-eierskap-januar-2020.pdf (only in Norwegian).

[211] GUIDELINES FOR INSTITUTIONAL INVESTORS GOVERNING THE EXERCISING OF PARTICIPATION RIGHTS IN PUBLIC LIMITED COMPANIES, *available at* https://swissinvestorscode.ch/?lang=en.

[212] SRD II, *supra* note 17.

[213] In Australia two different industry bodies have issued two stewardship codes, one for asset managers and another for asset owners. *See*, respectively, THE FINANCIAL SERVICES COUNCIL (FSC), FSC STANDARD 23: PRINCIPLES OF INTERNAL GOVERNANCE AND ASSET STEWARDSHIP (2013), *available at* https://www.fsc.org.au/web-page-resources/fsc-standards/1522-23s-internal-governance-and-asset-stewardship, and The AUSTRALIAN COUNCIL OF SUPERANNUATION INVESTORS (ASCI), THE AUSTRALIAN ASSET OWNER STEWARDSHIP CODE (2018), *available at* https://www.acsi.org.au/publications-1/australian-asset-owner-stewarship-code.html.

[214] AMEC Stewardship Code (2016), available at https://en.amecbrasil.org.br/wp-content/uploads/2016/11/Amec-Stewardship-Code-Final-Draft.pdf.

Canada,[215] Japan,[216] Hong Kong,[217] India,[218] Kenya,[219] Korea,[220] Malaysia,[221] Singapore,[222] South Africa,[223] Thailand,[224] Taiwan,[225] and

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[215] CANADIAN COALITION FOR GOOD GOVERNANCE STEWARDSHIP PRINCIPLES, STEWARDSHIP PRINCIPLES (2017) *available at* https://www.ccgg.ca/wp-content/uploads/2019/03/Stewardship-Principles-2019-update.pdf.

[216] THE COUNCIL OF EXPERTS CONCERNING THE JAPANESE VERSION OF THE STEWARDSHIP CODE, PRINCIPLES FOR RESPONSIBLE INSTITUTIONAL INVESTORS "JAPAN'S STEWARDSHIP CODE" (2017), *available at* http://www.fsa.go.jp/news/25/singi/20140227-2/05.pdf.

[217] SECURITIES AND FUTURES COMMISSION, PRINCIPLES OF RESPONSIBLE OWNERSHIP (2016), *available at* http://www.sfc.hk/web/EN/files/ER/PDF/Principles%20of%20Responsible%20Ownership_Eng.pdf.

[218] In India, three stewardship codes with different scope have been introduced. *See* INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY OF INDIA, GUIDELINES ON STEWARDSHIP CODE FOR INSURERS IN INDIA, IRDA/F&A/GDL/CMP/059/03/2017 (22 March 2017); PENSION FUND REGULATORY AND DEVELOPMENT AUTHORITY (PRDA), COMMON STEWARDSHIP CODE, PFRDA/2018/01/PF/01 (4 May 2018); SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI) , STEWARDSHIP CODE FOR ALL MUTUAL FUNDS AND ALL CATEGORIES OF AIFS, IN RELATION TO THEIR INVESTMENT IN LISTED EQUITIES, CIR/CFD/CMD1/168/2019 (24 December 2019).

[219] CAPITAL MARKETS AUTHORITY, THE STEWARDSHIP CODE FOR INSTITUTIONAL INVESTORS (2017), *available at* https://www.cma.or.ke/index.php?option=com_phocadownload&view=category&id=92&Itemid=285.

[220] KOREA STEWARDSHIP CODE COUNCIL, KOREA STEWARDSHIP CODE: PRINCIPLES ON THE STEWARDSHIP RESPONSIBILITIES OF INSTITUTIONAL INVESTORS (2016), *available at* http://sc.cgs.or.kr/eng/main/main.jsp.

[221] MINORITY SHAREHOLDER WATCHDOG GROUP & SECURITIES COMMISSION MALAYSIA, MALAYSIAN CODE FOR INSTITUTIONAL INVESTORS (2014), *available at* https://www.sc.com.my/api/documentms/download.ashx?id=9f4e32d3-cb97-4ff5-852a-6cb168a9f936.

[222] STEWARDSHIP ASIA, SINGAPORE STEWARDSHIP PRINCIPLES FOR RESPONSIBLE INVESTORS (2016), *available at* http://www.stewardshipasia.com.sg/sites/default/files/Section%202%20-%20SSP%20(Full%20Document).pdf. In October 2018 Stewardship Asia introduced the first-of-its-kind stewardship code for family owners. *See* STEWARDSHIP ASIA, STEWARDSHIP PRINCIPLES FOR FAMILY BUSINESSES, *available at* https://www.stewardshipasia.com.sg/sites/default/files/SSP-brochure-0913_approved%20for%20printing.pdf. For an in-depth analysis of the complexities of Singapore-style stewardship, see Dan W Puchniak & Samantha Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, _ Vand. J. Trans'l L. _ (2020 Forthcoming).

[223] INSTITUTE OF DIRECTORS SOUTHERN AFRICA, THE CODE FOR RESPONSIBLE INVESTING IN SOUTH AFRICA (CRISA) (2011), *available at* https://www.iodsa.co.za/page/CRISACode.

[224] THE SECURITIES AND EXCHANGE COMMISSION, INVESTMENT GOVERNANCE CODE FOR INSTITUTIONAL INVESTORS (I CODE) (2017), *available at* http://www.cgthailand.org/microsite/documents/ICodeBookEN.pdf.

the US,[226] and advocated globally by the International Corporate Governance Network (ICGN),[227] and other regional investor associations, such as the European Fund Asset Management Association.[228] This gradual internationalization, and at the same time fragmentation, of shareholder stewardship as a body of soft law for institutional investors has led to a substantial but still far from comprehensive body of literature in recent years, focusing primarily on the effectiveness of the inaugural UK Code and its exportability to other jurisdictions.[229] Here, we examine the development of the law of shareholder stewardship under the lens of transnational regulatory governance, focusing on four key issues that are critical for norm-creation, i.e. *functions*, *authorship*, *nature* and *enforcement*.

In general, stewardship codes are relatively short collections of principles and best practices that are accompanied by recommendations and suggestions directed to institutional investors (mainly asset owners and asset managers) and by extension to service providers, or in some cases the law-maker,[230] concerning the corporate governance role of investment institutions and asset managers, including engagement and monitoring of investee companies (corporate governance aspects) as well as their responsibilities towards the ultimate investors (whether pension fund beneficiaries, mutual fund investors, insurance beneficiaries or hedge fund investors), including avoiding conflicts of interests and reporting duties (investment management aspects). Coming into existence with the 2010 UK Code stewardship codes espoused investor-led governance as a positive regulatory mechanism. For instance, one of the key objectives of the first two versions of the UK Code, which traces back to the 2010 *Code on the Responsibilities of Institutional Investors* of

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[225] TAIWAN STOCK EXCHANGE, STEWARDSHIP PRINCIPLES FOR INSTITUTIONAL INVESTORS, *available at* http://cgc.twse.com.tw/static/stewardship_en.pdf.

[226] INVESTOR STEWARDSHIP GROUP, STEWARDSHIP FRAMEWORK FOR INSTITUTIONAL INVESTORS (2017), *available at* https://isgframework.org/stewardship-principles/.

[227] International Corporate Governance Network (ICGN), ICGN Global Stewardship Principles (2016), *available at* https://www.icgn.org/sites/default/files/ICGNGlobalStewardshipPrinciples.pdf.

[228] EFAMA STEWARDSHIP CODE, PRINCIPLES FOR ASSET MANAGERS' MONITORING OF, VOTING IN, ENGAGEMENT WITH INVESTEE COMPANIES, FIRST ADOPTED ON 06 APRIL 2011, REVISED IN 2017-2018, *available at* https://www.efama.org/Publications/Public/Corporate_Governance/EFAMA%20Stewardship%20Code.pdf.

[229] *See*, *e.g.*, David William Roberts, *Agreement in Principle: A Compromise for Activist Shareholders from the UK Stewardship Code*, 48 VAND. J. TRANSNAT'L L. 543 (2015).

[230] This is the case of the IGCN Code, *supra* note 227.

the since dissolved Institutional Shareholders' Committee (ISC Code),[231] is to promote "the long term success of companies in such a way that the ultimate providers of capital also prosper".[232] Such an objective reflects the rationale whereby "shareholders" function "as monitors".[233] Meanwhile, the (rebuttable) assumption is that such monitoring of corporate affairs by institutional investors should not only improve the governance and performance of investee companies, but should also assist in the efficient operation of the markets while strengthening the credibility of the market economy as a whole. But the objectives of stewardship codes are more perplexed. Shareholder stewardship (perhaps optimistically) conceptualizes investors as performing a two-fold function: a *monitoring (corporate governance) function* promoting long-term shareholder value and broader stakeholder welfare and an *accountability function* protecting the interests of the investors' clients and ultimate investors (investment management) as well as the shareholders and stakeholders of their investee companies (corporate governance). Under the spell of this so-called investor paradigm,[234] which dovetails with the theory of "universal owners",[235] the key tenets of the institutions' investment management and corporate governance functions and how they relate to institutions' long-term liabilities and long term corporate performance are regarded to be blessed by a broader public interest in the creation of social value, beyond the maximization of profits. Clearly, the (perhaps) magic(?) regulatory formula of stewardship is aimed at protecting the private interests of ultimate clients and beneficiaries, while at the same time promoting long-term corporate governance and sustainability coalescing shareholder with stakeholder interests and private with public interests.

On a substantive level, this important institutional characteristic of stewardship codes is exemplified in their corresponding regard for public policy concerns which are extraneous to considerations of shareholder

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[231] The ISC Code is *available at* https://www.theinvestmentassociation.org/assets/components/ima_filesecurity/secure.php?f=industry-guidance/isc-01.pdf.

[232] UK Code 2012, *supra* note 206, at 1.

[233] It is noteworthy, however, that the current UK Code 2020 defines stewardship as "the responsible allocation and management of capital across the institutional investment community to create sustainable value for beneficiaries, the economy and society" and therefore prioritizes the investment management perspective of stewardship to the corporate governance one. *See* UK Code 2020, *supra* note 206, at 4.

[234] *See*, further, Katelouzou, *Reflections on the Nature*, *supra* note 200.

[235] For a criticism of the theory of universal owners, see Benjamin J. Richardson & Maziar Peihani, *Universal Investors and Socially Responsible Finance: A Critique of a Premature Theory*, 30 BANKING & FIN. L. REV. 405 (2015).

welfare. Even though there are differences in terms of the specific content, authorship and nature across the various stewardship codes,[236] they all reflect the view that engagement by institutional investors is an enforcer of good corporate governance, while they recognize that powers come with responsibilities at both the investment management and corporate governance levels, thereby, tapping into the major problem with increasing solicitude for shareholders, namely the rise of financialization and short-term shareholder value processes at the expense of other stakeholders.[237] In addition, all the twenty-two national stewardship codes link the interests of ultimate investors with those of the stakeholders of the investee companies, despite variations in emphasis, substantive details and context.[238] Further, the overwhelming majority (fourteen) clearly links stewardship to the creation of long-term sustainable value for the investee companies.[239] Sixteen stewardship codes specifically refer to social, environmental and governance (ESG) considerations thereby re-bundling "socially responsible investment" (SRI)[240] into shareholder stewardship.[241] This trend of advocating long-termism and ESG-aware investing through stewardship codes and

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[236] On the different issuing bodies of national stewardship codes, see Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 506-13 (2018).

[237] *See*, further, Dionysia Katelouzou, *Shareholder Stewardship: A Case of (Re)Embedding Institutional Investors and the Corporation?*, in CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY (Beate Sjafjell & Christopher M. Bruner eds., 2019).

[238] For instance, the Japanese Stewardship Code tends to emphasize more shareholders' interests rather than the interests of the ultimate beneficiaries and wider stakeholders. On a detailed comparison between the UK and Japanese Stewardship Codes, see Gen Goto, *The Logic and Limits of Stewardship Code: The Case of Japan*, 15 BERKELEY BUS. L. REV. 365 (2019).

[239] These are: ASCI Code, *supra* note 213, at 5; Canadian Code, *supra* note 215, at 7; CRISA, *supra* note 223, at 4 and 7; Danish Code, *supra* note 207, p. 3; Dutch Code, *supra* note, at 1; FSC Code, *supra* note 213, at 3; Hong Kong Code, *supra* note 217, at 1; Italian Code, *supra* note 208, at 16; Japan's Code, *supra* note 216, at 3; Kenyan Code, *supra* note 219, at 3; Malaysian Code, *supra* note 221, Preface; Singapore Code, *supra* note 222, at 3; Korea Code, *supra* note 220, at 3; Swiss Code, *supra* note 211, at 4; Taiwan Code, *supra* note 225, at 2; and UK Code, *supra* note 206, at 1.

[240] Further on the meaning of SRI, s*ee* Eurosif, European SRI Study 2016, *available at* http://www.eurosif.org/wp-content/uploads/2016/11/SRI-study-2016-HR.pdf.

[241] These are: AMEC Code, supra note …, at 12; Canadian Code, *supra* note 215, at 7; CRISA, supra note 223, at 4; Dutch Code, supra note…; at 7; FSC Code, *supra* note 213, at 10; Hong Kong Code, *supra* note 217, at 3; Italian Code, *supra* note 208, at 16; Japan's Code, supra note 216, at 2; Kenyan Code, supra note 219, at 2892; Malaysian Code, supra note 221, at 13; PRDA, supra note 218, at 1; SEBI, supra note 218, at 3; Singapore Code, supra note 222, at 6; Taiwan Code, *supra* not 225, at 8; Thai Code, *supra* note 224, at 37; and UK Code 2020, supra note 206, at 15.

principles is also supported by the ICGN Global Stewardship Principles,[242] and the EFAMA Code,[243] while the recently revised UK Code elevated social and environmental factors, including climate change, to central components of stewardship.[244]

In a similar vein, the SRD II is very much premised on the acceptance that an active corporate governance role for institutions will be aligned with the interests of their beneficiaries and the wider stakeholders of their portfolio companies.[245] Article 3g of the directive requires institutional investors and asset managers to develop an engagement policy with the aim to improve both the financial and non-financial performance of their investee companies, including the reduction of social and environmental risks and compels institutional investors and asset managers to engage with stakeholders (in particular employees) in developing a balanced, long-term framework of corporate governance. The directive, therefore, reflects a broad-based public interest in making institutional shareholders accountable for broader concerns in respect of companies' operations and to wider constituents in the exercise of their engagement powers. [246] Public disclosure imposed on institutional investors and asset managers[247] also seems to indicate the imposition of accountability on institutions beyond the private contours of their investment management relationship with their beneficiaries.

Overall, the development of stewardship codes and principles bring a "public" coloration into shareholder engagement, which is essentially a "private" matter and can be seen as an –effort, but arguably an optimistic one, to realign the relationship between ownership and control of public companies, which had become increasingly divorced in the post-war decades and re-embed corporate governance and investment management into society.[248] For transnational corporate governance regulation the rise and expansion of stewardship codes reflects the significant change over the past ten years concerning the question of

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[242] ICGN Code, *supra* note 227, Preamble, at 5 and Principle 6.

[243] EFAMA Code, supra note 228, at 5.

[244] UK Code 2020, *supra* note 206, Principles 4 and 7 and at 4 (stating that [e]nvironmental, particularly climate change, and social factors, in addition to governance, have become material issues for investors to consider when making investment decisions and undertaking stewardship").

[245] *See* SRD II, *supra* note 17, Recitals 14 and 15.

[246] On the public interests of the SRD II, *see* Iris H-Y Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: is the Time Ripe?,* in: SHAREHOLDERS' DUTIES 131 (Hanne S. Birkmose ed., 2017).

[247] *See* SRD II, *supra* note 17, Articles 3g, 3h and 3i.

[248] *See*, further, Katelouzou, *Shareholder Stewardship*, *supra* note 237.

output legitimacy: more than ever are questions asked today that focus on who is "affected" by institutional investors' behavior and, by consequence, by the promotion or the absence of relevant stewardship codes.

The expansion of the stewardship codes' regulatory prerogatives and directions also reflects back on the transformation of its associated constituencies. It is important to note in this respect that with regard to corporate governance's "input legitimacy", numerous private and public actors have become direct intervenors in the design of the stewardship codes and investors' sustainability compliance regimes. Increasingly, we witness a cross-fertilization and deterritorialized production of norms produced by various private and public actors and the implications of such norm-production for the nature and enforcement of these codes.[249] For instance, as noted above, the UK Code evolved out of the 2010 Code of the now dissolved ISC, which was set up at the behest of the Bank of England in the 1970s as part of the Heath government's attempts to improve the relationships between institutional investors and public companies.[250] The members of the ISC were the originally four major UK institutional investors' associations, i.e. the National Association of Pension Funds and the associations (then separate) representing investment trusts, unit trusts and insurers.[251] In 1991 the ISC published a statement which sets out non-binding, best practices for institutional investors and agents in relation to their responsibilities in respect of their investee companies.[252] This statement was revised in 2002, 2005 and 2007 before being upgraded to its status as a Code in 2009 (revised in 2010) that applied to institutional investors on a comply-or-explain basis. The ISC's principles was an attempt by the institutional investors to self-regulate themselves pushing back any government intervention in respect of institutional shareholder engagement, especially following the Myners Review's recommendation in 2001 to impose a statutory duty on asset managers "to intervene in companies – by voting or otherwise – where there is a

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[249] For an approach in that direction, see already Ruth Aguilera and Gregory Jackson, *The Cross-National Diversity of Corporate Governance: Dimensions and Determinants,* 28 ACADEMY OF MANAGEMENT REV., 447-465 (2003).

[250] On the policy role of the ISC, see DAVIES A, THE CITY OF LONDON AND SOCIAL DEMOCRACY: THE POLITICAL ECONOMY OF FINANCE IN BRITAIN, 1957-1979 (2017).

[251] The Association of Investment Trust Companies and the Association of Unit Trust Managers have now merged to the Investment Management Association (IMA), while the Association of British Insurers (then British Insurance Association) has merged its investment department with the IMA to create the Investment Association.

[252] ISC, "The Responsibilities of Institutional Shareholders in the UK (December 1991)"; *see* also Mila R. Ivanova, *Institutional investors as stewards of the corporation: Exploring the challenges to the monitoring hypothesis*, 26 BUS. ETH. 175 (2017).

reasonable expectation that doing so might raise the value of the investment".[253] UK policymakers had long regarded institutional shareholder engagement as vital to the corporate governance of public companies, but had deliberately sought (especially since the 1990s) to induce institutional shareholders to develop their own self-regulatory responses to public concerns arising from the reluctance of institutional investors to take an active stance in relation to corporate underperformance. Notably, the Cadbury Report fully endorsed the ISC's 1991 statement and called on institutional investors to play a more active role in the corporate governance of UK public companies.[254] The Combined Code and subsequent versions of the UK Corporate Governance Code (now 2018) invariably encouraged institutional investors to engage constructively with the board of directors and to use their ownership influence to pressurize companies towards compliance with the Code's provisions,[255] while the Myners Review and Higgs Review both endorsed the ISC's principles.[256]

The upgrade of the ISC's principles to a soft Stewardship Code introduced by the FRC in 2010 is an example of "enforced self-regulation",[257] otherwise referred to as "meta-regulation",[258] and is part of an emerging market-oriented governance landscape which is closely associated with the long tradition of corporate governance codes. The 2010 (and 2012) UK Code, like the UK Corporate Governance Code, adopted the comply-or-explain approach, that is voluntary signatories to the Code should comply or else explain why they do not comply with the Code's seven principles.[259] In a significant break with the long tradition of comply-and-explain in the area of corporate governance regulation, the

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[253] PAUL MYNERS, INSTITUTIONAL INVESTMENT IN THE UNITED KINGDOM: A REVIEW (2001), *available at* http://uksif.org/wp-content/uploads/2012/12/MYNERS-P.-2001.-Institutional-Investment-in-the-United-Kingdom-A-Review.pdf, at 14.

[254] CADBURY REPORT, *supra* note 149, sections 4.59, 6.11, 6.12, and 6.16. *See* also John Holland, *Self regulation and the financial aspects of corporate governance*, J. BUS. L.127 (1996).

[255] UK Corporate Governance Code 2018, *supra* note 153, at 2.

[256] Myners Review, *supra* note 255; HIGGS REVIEW, REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS (2003), available at https://webarchive.nationalarchives.gov.uk/20121106105616/http://www.bis.gov.uk/files/file23012.pdf, at 70.

[257] John Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 16 MICH. L. REV. 481-504 (1982).

[258] Cary Coglianese and Evan Mendelson, *Meta-Regulation and Self-Regulation*, in THE OXFORD HANDBOOK OF REGULATION (Robert Baldwin, Martin Cave and Martin Lodge eds., 2010).

[259] UK Code 2012, *supra* note 206, at 4.

2020 UK Code adopts the stricter apply-and-explain approach emphasizing on stewardship outcomes rather than policies. Both approaches, however, are investor-led based on what UK regulators envisage as a "market for stewardship".[260] Stewardship signatories are expected to provide good annual reporting on stewardship, while asset owners are expected to monitor the stewardship activities of their asset managers. This emerging "market for stewardship" in the UK is supported by the facilitating role of the FRC's tiering exercise[261] as well as the support provided by the Investor Forum[262] and the Investment Association's Public Register and Long-term Reporting Guidance.[263] At the same time, social enforcement (reputation) mechanisms, such as public esteem or shaming carried out by investors themselves,[264] the media[265] and civil society groups, [266] are becoming a key device for promoting stewardship and sustainability, especially climate change. Correspondingly, the enforcement of stewardship becomes an example of "dynamic accountability" within what Sabel and Zeitlin call

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[260] *See, e.g.*, FRC and FCA, Building a regulatory framework for effective stewardship, Discussion Paper DP19/1 (January 2019), *available at* https://www.fca.org.uk/publication/discussion/dp19-01.pdf.

[261] FRC, Tiering of signatories to the Stewardship Code, PN 66/16 (14 November 2016), *available at* https://www.frc.org.uk/news/november-2016/tiering-of-signatories-to-the-stewardship-code.

[262] The Investor Forum was established in 2014, following the Kay Review 2012, to promote long-term shareholder engagement with UK companies. More information about the role and activities of the Investor Forum is *available at* https://www.investorforum.org.uk/.

[263] The Investment Association introduced the public register for shareholder dissent in December 2017 at the request of the UK Government. Also, following the introduction of a new reporting requirement by the UK Corporate Governance Code 2018 for companies which see 20 per cent of more of votes being cast against the board recommendation for a resolution, the Investment Association published guidance on long-term reporting. More information is *available at* https://www.theia.org/public-register.

[264] *See*, *e.g.*, the letter sent by Blackrock's CEO to CEOs in 2017 , *available at* https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter; the letter sent by State Street to company boards, *available at* https://www.ssga.com/investment-topics/environmental-social-governance/2017/Letter-and-ESG-Guidelines.pdf. For the potential shaming capacity of regulators, see FRC threatens to "shame" fund managers over stewardship, FIN. NEWS, Dec 14, 2015, available at https://www.fnlondon.com/articles/frc-threatens-to-shame-fund-managers-over-stewardship-code-20151214.

[265] *See*, *e.g.*, Michal Goldstein, Does Flight-Shaming Over Climate Change Pose An Existential Threat to Airlines?, FORBES Jun. 4, 2019, *available at* https://www.forbes.com/sites/michaelgoldstein/2019/06/04/does-flight-shaming-over-climate-change-pose-an-existential-threat-to-airlines/#204458b83cfc.

[266] *See*, *e.g.*, the work of Ceres, https://www.ceres.org/.

"experimentalist governance"[267] where public and private (market and social) actors work together to create regulatory arrangements and support enforcement. This accountability-through-peer-review has for all UK-authorized asset managers a more coercive effect as it is backed by the Financial Conduct Authority's Code of Conduct Handbook.[268] This element of coerciveness of the UK Code through the introduction of an associated disclosure obligation on asset managers authorized by the FCA is broadly equivalent in effect to the effect of the UK Listing Rules for public companies, albeit different in scope and detail.

Similar to the UK Code, all the other national stewardship codes are voluntary, soft-law developments based on self-proclamation and market enforcement, but the degree of their softness largely depends on the issuing body. From the total twenty-two national stewardship codes, nine have been issued by regulators or quasi-regulators and they all adopt a variant of the comply-or-explain or apply-and-explain enforcement model.[269] Yet, from these the UK, Dutch, Indian (SEBI) and Japanese Codes are supported in their function from an underpinning body of mandatory rules and/or institutions as there is an obligation on the part of domestic investors to comply-or-(apply-and)explain.[270] From the rest eleven codes, which have been issued by various industry participants or investors themselves, six adopt the comply(apply)-or-explain principle,[271] while the rest are completely voluntary in nature.[272]

At the supranational level, Article 3g of the SRD II also adopts the comply-or-explain approach. However, it has been elsewhere argued that the SRD II is not far short of imposing a duty to demonstrate engagement,

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[267] Michael C. Dorf and Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Charles F. Sabel and Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14 EUR. L. J. 271 (2008).

[268] Conduct of Business Rule 2.2.3, available at http://fsahandbook.info/FSA/html/handbook/COBS/2/2.

[269] These are the codes in Denmark, Hong Kong, India (SEBI), Kenya, Japan, Malaysia, Taiwan, Thailand and the UK.

[270] *See*, e.g., Japan's Code, *supra* note 216, at 6. It is expected that this coercive element will be expanded in the EU following the transposition of the SRD II. For a comprehensive analysis of the enforcement parameters of stewardship, see Dionysia Katelouzou & Konstantinos Sergakis *The Characteristics and Dynamics of Stewardship Enforcement* in GLOBAL SHAREHOLDER STEWARDSHIP: COMPLEXITIES, CHALLENGES AND POSSIBILITIES (Dionysia Katelouzou & Dan Puchniak eds. 2020 Forthcoming).

[271] These are the codes in Australia (ASCI), India (IRDAI), Italy, South Africa, Switzerland, South Korea.

[272] These are the codes in Brazil, Canada, Norway, Singapore and the US.

as there is a duty on the part of asset owners and asset managers to publicly disclose the implementation and achievement of such engagement under Articles 3h and 3i.[273] Arguably the disclosure-based regulation compels that certain engagement conduct needs to be carried out in order for there to be sufficient matters to report and moves away from treating shareholder engagement as a voluntary practice, as is the case under national stewardship codes. The SRD II, in a "capital market regulation facet",[274] is therefore a step towards legalizing or juridifying shareholder engagement and stewardship as a response to the social appetite for increasing regulation post the GFC. Moreover, Article 14b enables – but not obliges – Member States to provide for public enforcement for violations of the SRD II transposed provisions into national law. While only Italy and the Netherlands have introduced such penalties for violations of engagement and disclosure duties, the directive does not operate in a normative vacuum since four Member States, Denmark, Italy, the Netherlands, the UK, have their own domestic soft-law stewardship codes. These different approaches in enforcing stewardship are reflective of the increasing poly-centricity of stewardship norms and raise important questions about the future symbiosis of soft and semi-hard law norms.[275] Finally, in terms of "output legitimacy", while it is questionable whether soft law can efficiently serve more paternalistic objectives, subjecting institutional investment management to standards and scrutiny is arguably a form of re-regulation, in order to ensure that the privatized and financialized form of social welfare provision may deliver public interest objectives in due course.

Our analysis shows that the development of the law of shareholder stewardship over the last decade is a powerful example of the complex intricacies between shareholder primacy and broader stakeholder welfare as regulatory objectives, and between internalized, self-regulatory processes of market-invoking regulation and official law making at both domestic and supranational levels. The development of stewardship codes also confirms the inseparability of corporate governance regulation and investment management regulation (and wider law-making reform) when it comes to introducing standards of optimal institutional shareholders' behavior. Shareholder stewardship can be also seen as an example of an

[273] Chiu & Katelouzou, *supra* note 247.

[274] For a critical approach, see Alessio M. Pacces, *Shareholder Activism in the CMU*, in CAPITAL MARKETS UNION IN EUROPE 507, 523 (Danny Busch, Emilios Avgouleas and Guido Ferrarini, eds. 2018).

[275] Katelouzou & Sergakis, *supra* note 272.

increase of the national "policy space" in a global economy.[276] Following in the steps of the development of corporate governance codes, the rapid diffusion of stewardship principles through replication and adaptation is a powerful denotation of the way in which private ordering maintains an intricately challenging tension with the embedded, institutional frameworks for official law-making. While some convergence towards universally acceptable stewardship principles can arguably arise from the operation of institutional investors, the stewardship codes themselves are embedded in the complex emerging political economies of corporate governance. The development of stewardship in countries with various shareholder, legal, institutional, economic, and cultural environments suggests that stewardship codes may have taken on a different role – perhaps multiple different roles – than the original "investor paradigm" underpinning the UK Code. Indeed, a few examples suggest that this may be occurring in myriad ways, with important implications for norm creation and law-making processes yet to be explored. In South Africa, the Code for Responsible Investing appears to prioritize responsible investment and ESG factors over all other ownership responsibilities.[277] In Japan, the Code appears to be a policy tool aimed at fulfilling a political and economic goal of reorienting governance away from its traditional lifetime employee stakeholder form of corporate governance. In effect, it is geared towards a more shareholder focused form of governance to promote risk taking and to improve returns on capital, while distinctly lacking, it seems, the public interest orientation that we have identified in other codes.[278] In Singapore, stewardship principles developed and promoted by a government supported entity, Stewardship Asia, have set the rules of the game for how institutional investors should engage with listed companies – yet many of the most important listed companies are themselves government controlled.[279] In Europe, it is unlikely that the SRD II will facilitate a convergence movement towards a single, harmonized set of stewardship principles as it engages in open

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[276] *See* Jonathan Zeitlin and Charles Sabel (2011), *Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms,* Working Paper (2011), available at http://www2.law.columbia.edu/sabel/papers/experimentalismintransnationalgovernanceISApaper%20(2).pdf.

[277] CRISA, *supra* note 223, at 4.

[278] Goto, *supra* note 239.

[279] Puchniak & Tang, *supra* note 222 (arguing that the development of the Singaporean Code serves the function of "halo signaling" demonstrating commitment to global standards of good corporate governance).

competition with pre-existing domestic stewardship codes or principles.[280] At the same time, the ICGN Principles has still to play the role of an international benchmark for good stewardship similar to the global relevance of the OECD Principles of Corporate Governance.

At the end of this exemplary case study we find that the evolving *law* of shareholder stewardship can shine some light on the new forms of transnational embeddedness of regulatory innovation in locally defined governance structures on the one hand, and their integration in spatially unfolding rule-making processes, on the other. As regards the here relevant actors, norms and processes, we find a tension that has long been growing between private and state, domestic and international actors, between shareholder primacy and broader stakeholder welfare, and between market-invoking and official-law making processes. Correspondingly, the development of the law of shareholder stewardship is a powerful illustration of the promise of a new methodology of transnational corporate governance in offering the necessary tools and the required analytical framework for understanding corporate governance regulation in the 21st century.

V. CONCLUSION: TRANSNATIONAL CORPORATE GOVERNANCE – THE STAKES OF NORM CREATION RECONSIDERED

The development of stewardship codes and principles by private and public actors to define institutional investors' and asset managers' responsibilities is part of an emerging market-oriented governance landscape which has seen a significant rise of corporate governance codes and codes of conduct, a development which still begs important explanation of cause, agency and, certainly, legitimacy. To simply attribute the expansion of private corporate governance norm production to the retreat of the state or the mounting public pressure on the state and on corporations to embrace the idea of corporate (social, environmental) responsibility, fall short of fully capturing the regulatory dynamics that have been shaping this field. But their very nature – their blended private and public objectives, their oscillation between hard and soft law and between state intervention and market ordering – has begun

[280] Dionysia Katelouzou & Konstantinos Sergakis, *When Harmonisation is not Enough: Shareholder Stewardship in the European Union*, Working paper (2020, on file with the authors). *See* also Gen Goto, Alan K. Koh & Dan W. Puchniak, Diversity of Shareholder Stewardship in Asia: Faux Convergence, Working Paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3481543 (arguing that stewardship codes lead to the phenomenon of "faux convergence").

to fundamentally alter the already demarcated regulatory landscape of corporate governance and pose significant questions, not only for regulatory governance in the area of corporate regulation. Effectively, the here undertaken attempt to revisit, retell and reimagine the emerging political economies of corporate governance *as* a transnational regulatory problem has opened up perspectives on the bigger picture of which corporate governance is but a part.

We used shareholder stewardship as to illustrate the expansion and, at the same time, the deepening of national and regional policy spaces in a global economy. It is here where we came up with unexpected results. The development of stewardship codes speaks to the emergence of legal regimes that can no longer adequately be explained with reference to the "state" or the "market", and is an example of intricate, domestic and transnational, multi-level processes of norm generation involving different national, supranational and private actors, using non-traditional processes through which norms are being generated, which do not wholly comply with categories of statute, rule or treaty. We also found, that, in times of perceived and increasingly critically scrutinized market failures, the generation of soft law in the form of not always non-binding norms is being outsourced, but not to the markets directly. Instead, the task of coming up with a suitable regulatory regime is uploaded and relegated to supranational actors. The SRD II is an example of pursuing the harmonization of an area of law which had for a long time been perceived as overly privatized and, normatively, market-focused. In the SRD II, the originally soft, investor-driven law of shareholder stewardship appears to coalesce into hard, regulatory law after arriving at a state of what the late sociologist Niklas Luhmann, referred to as "counterfactually stabilised behavioural expectations."[281] Given the continuously growing pressure of global securities markets and their attending rules on the normative architecture of corporate law, a key question we need to ask is whether we are indeed facing a re-bundling of soft law corporate governance norms into hard law capital markets law.

A related question concerns the normative assessment of emerging transnational corporate governance regimes such as the stewardship one. The so-called and endlessly abused "public interest" might function as a reference point when calling private investment management of

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[281] *See* NIKLAS LUHMANN, A SOCIOLOGICAL THEORY OF LAW [orig. German, 1972] 33 (E. King-Utz & M. Albrow, transl., 2nd ed., 2014) (arguing that "[n]orms are *counterfactually stabilized behavioral expectations*. Their meaning implies unconditional validity, in so far as the validity of the norm is experienced, and thus institutionalized, as independent of actual fulfilment or non-fulfilment.").

financialized social wealth to account. But, more likely is the re-characterization of any future stewardship legalization as a form of regulatory accountability framework which goes beyond the traditional, law-and-economics approach to the corporate governance role of institutional shareholders to a broader "regulatory ecology" serving both private and public interests.[282] There is also the issue of the chosen enforcement mode. Unlike the tradition of market-invoking regulation in the area of corporate governance which is based very much on the premise of enabling, private and market-driven regulatory modes, the development of shareholder stewardship serves more paternalistic objectives of aligning institutional investors' corporate governance role with long-term corporate wealth creation as a social good. But if this is the purported regulatory aim behind the development of shareholder stewardship, the adoption of soft, "comply or explain" or "apply and explain" enforcement approaches seems out of step. While market discipline has long served as the default enforcement mode in corporate governance regulation and has been extensively examined within the context of corporate governance codes, letting asset owners and other market participants as the only monitors of the veracity of both the signatory statements and the actual outcomes of stewardship is not only of questionable effectiveness but is also out of step with the stated, "public" regulatory objectives.[283]

It is therefore necessary to ask, whether this infused paternalism and the gradual hardening of the shareholder stewardship norms in the SRD II is but a superficial change or whether, instead, we should welcome it as an opportunity to place the institutional investors and the corporation more broadly in a post-"Embedded Liberalism" context. From the perspective of transnational corporate governance, the development of stewardship codes shows how the tradition of "market-focused" corporate governance regulation can and should no longer rely account on the path-dependent trajectories of national, law-making processes. The emergence of a transnational corporate governance is characterized by an intricate combination of public and private agency, but also of a variety of regulatory, evolving instruments where "hard" law is not stable. In that

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[282] *See* Beate Sjåfjell and Mark B Taylor *Clash of Norms: Shareholder Primacy vs. Sustainable Corporate Purpose* 13 INT'L & COMP. CORP. L. J. 40-66 (2019) (examining the interaction of corporate regulation with the social norms of shareholder primacy and sustainability and the development of a regulatory ecology of corporate purpose).

[283] *See* Iris H-Y Chiu & Dionysia Katelouzou, J. BUS. L. 67 (2018) (examining the inadequacies of the UK regulatory regime to address the public interests of investor-led governance and stewardship and proposing ways to address this via mandatory securities and investment management regulation).

sense, domestic corporate governance reform must be seen as part of an emerging transnational legal pluralism, which is shaped by the continuing normative legacies as well as the institutional and processual path-dependencies of particular, local political economies. But, at the same time, the legal pluralism of transnational corporate governance reveals itself in the co-existence, the interpenetration and the interaction of different regulatory forms.

Seen in this light, the case of shareholder stewardship is illustrative of how soft law recommendations can enter a regulatory realm which is occupied by both public and private norm-entrepreneurs. While the former includes "the state" which pursues corporate law reform, the latter encompasses a wide range of private actors such as banks, investments funds, and expert groups who are calling for new rules to govern investment conduct. But, it also includes other stakeholders such as unions and labor activists, as well as civil society groups uniting and campaigning under different flags and themes. From this perspective, shareholder stewardship denotes how soft law recommendations may grow into widely accepted norms of "good governance" and solidify the perceived public interest. Shareholder stewardship is not the only case where we can draw out the complex correlations between different actors, levels and spaces of norm creation or where we can trace the infusion of public, stakeholder objectives into shareholder welfare. The well-examined examples of the development of corporate governance codes and corporate codes of conduct already show the "law's poly-contextualization".[284] As for the newly amplified public interest in transnational corporate governance regulation, this traceable trend can be, for example, found in post-GFC corporate governance regulations in the UK and elsewhere, where efforts are underway that aim at solidifying public policies such as wealth distribution, equality in the boardrooms and labor force, and various social goals including long-term enterprise sustainability, wider stakeholder welfare, the protection of the environment, or gender and racial equality in economic organizations. Such policies are concerned with the objectives and outcomes of corporate activity within the wider fabric of the economy and the society and go well beyond law-and-economics perceptions of the corporation and its perceived purpose, effectively feeding into the changing policies of transnational corporate governance regulation in globally integrated, yet locally distinct market and regulatory places.

The analysis offered in this article should be seen as woven into the broader transformative trends in transnational law, global law and legal

[284] CALLIESS & ZUMBANSEN, *supra* note 140.

pluralism. It seeks to cut through the distinct layers of comparative company law and institutional analysis to shed a new light on the far-reaching reform processes in domestic corporate governance systems worldwide but also on the proliferation of fora where, through new (and, old) actors and in reliance on and through the development of new processes of participation, drafting, dissemination and implementation, new norms are being created. Transnational corporate governance is here rendered as a methodological laboratory to inquire into emerging forms of authority and legitimacy, scrutinizing competing claims of effectiveness and testing the "real world" impact that emerging regulatory forms have on a wider set of stakeholders and "affected" populations. These new actors are directly engaged in negotiating competing interests regarding the economic but also the larger, social function of the firm, as they all operate in intertwined local and global contexts.[285] They make competing claims regarding participation and control, but also regarding accountability, long-term orientation and protection of a wide range of local and distant interests.[286] It comes as no surprise, then, that the scope of corporate governance regulation – whether it is the state or particular market actors who are taking the lead – continues to expand significantly. Concerns around environmental, social and economic sustainability, risk and reputation, equality and minority protection have become part of the field's "common lexicon",[287] while technological advances have an impact not only on the way both boardrooms and shareholder operate[288], but also with regard to artificial intelligence's fundamental transformation of financial markets operation.[289] In that vein, a critical project of transnational corporate governance prompts a reconceptualization of the "transnationally

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[285] *See, e.g.*, David Monciardini, *The Coalition of the Unlikely' Driving the EU Regulatory Process of Non-Financial Reporting* SOCIAL AND ENVIRONMENTAL ACCOUNTABILITY J. 76-89 (2016).

[286] Zumbansen, *Rethinking the Nature, supra* note 183.

[287] *See, e.g.*, Stavros Gadinis & Amelia Miazad, *Sustainability in Corporate Law*, Working Paper, 20 August 2019, *available at*: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441375.

[288] *See, e.g.*, Florian Möslein *Robots in the boardroom: artificial intelligence and corporate law* in RESEARCH HANDBOOK ON THE LAW OF ARTIFICIAL INTELLIGENCE (Woodford Barfield & Ugo Pagallo eds. 2018); Anne Lafarre & Christoph Can der Elst, *Blockchain technology for Corporate Governance and Shareholder Activism* European Corporate Governance Institute (ECGI) - Law Working Paper No. 390/2018, *available at* https://ssrn.com/abstract=3135209.

[289] World Economic Forum (in cooperation with Deloitte), *The New Physics of Financial Services. Understanding how artificial intelligence is transforming the financial ecosystem* (Geneva, August 2018), *available at*: http://www3.weforum.org/docs/WEF_New_Physics_of_Financial_Services.pdf.

embedded" corporation and its key actors as a counter model to today's financialized economic governance framework.